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No. _____

IN THE

Supreme Court of the United States

October Term, 1981

MICHAEL KAYE,

Petitioner,

v.

LUCE, FORWARD, HAMILTON & SCRIPPS;
and THEODORE W. GRAHAM,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether due process in a fee sanction case under *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), requires: (a) specification of charges and advance notice of hearing prior to any consideration of sanctions, (b) bifurcation of the sanction hearing from any hearing on the merits in the case in chief, and (c) opportunity at the sanction hearing to call favorable witnesses and to confront and cross-examine adverse witnesses, *before* the District Court may recommend the disbarment of an attorney in an opinion earmarked for publication or impose monetary sanctions against the attorney in an amount exceeding $36,000.

2. Whether a *Roadway Express* fee sanction in an amount exceeding $36,000 for filing a motion to reopen a bankruptcy case is sufficiently tantamount to a tort judgment for malicious prosecution or abuse of process to warrant the Seventh Amendment safeguard of trial by jury.

3. Whether the assessment of a punitive fee sanction against an attorney for an alleged abuse of process, "bordering on attempted fraud upon the Court," is so functionally indistinguishable from a fine for criminal contempt as to necessitate trial by jury under the Sixth Amendment when the amount of the penalty exceeds $36,000.

4. Whether district judges have discretionary power under Rule 7 of the Federal Rules of Appellate Procedure to deter or obstruct appeals from their own decisions by imposing exaggerated cost bond assessments which bear no reasonable relationship to actual costs and which exceed an appellant's financial resources, or whether 28 U.S.C. § 47 compels a narrower reading of Rule 7 and confines the district judge's discretion to the setting of a bond amount which approximates as closely as possible the actual costs that would be taxable in the appellee's favor if the appeal fails.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 10

A. Review Should Be Granted To Establish Procedural Standards For The Imposition Of Attorney Fee Sanctions Under *Roadway Express, Inc. v. Piper* 10

B. Pretermission Of Issues By The Ninth Circuit Does Not Preclude Review Where The Issues Were Presented Below, Are Ripe For Decision, And Are Important To The Administration Of Justice 15

C. Review Is Warranted To Determine Whether District Courts Must Fix Cost Bond Assessments Under Rule 7 Of The Federal Rules Of Appellate Procedure At Amounts Reasonably Related To Actual Costs Or Whether Exaggerated Assessments Are Permissible To Deter Or Obstruct Appeals Alleged To Be Frivolous 19

CONCLUSION 24

APPENDICES 25

TABLE OF AUTHORITIES

Page

CASES

Adkins v. DuPont Co., 335 U.S. 331 (1948)..... 22

Aetna Insurance Co. v. Kennedy, 301 U.S. 389 (1937)... 18

Albertson v. Raboff, 46 Cal.2d 375, 295 P.2d 405 (1956) 12

Atlas Roofing Co. v. Occupational Safety Commission
430 U.S. 442 (1977) 13

Babb v. Superior Court, 3 Cal.3d 841, 479 P.2d 379,
92 Cal.Rptr. 179 (1971)..... 14,17

Blonder-Tongue v. University Foundation,
402 U.S. 313 (1971) 16

Bloom v. Illinois, 391 U.S. 194 (1968) 13

Ex Parte Bradley, 7 Wall. (74 U.S.) 364 (1868)..... 11

Carlson v. Green, 446 U.S. 14 (1980)..... 16

Carr v. Grace, 516 F.2d 502 (5th Cir. 1975)..... 23

Curtis v. Loether, 415 U.S. 189 (1974)..... 13

Douglass v. First National Realty Corp.,
543 F.2d 894 (D.C. Cir. 1976)..... 14

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938)..... 16

Farmer v. Arabian American Oil Company,
285 F.2d 720 (2d Cir. 1960)..... 23

In re Marriage of Flaherty,
California Supreme Court No. S.F. 24307
(argued Oct. 1, 1981)..... 17

Girard v. Goins, 575 F.2d 160 (8th Cir. 1978)..... 14,18

TABLE OF AUTHORITIES (Continued)

Page

CASES (Continued)

Glass v. Pfeffer, 657 F.2d 252 (10th Cir. 1981) 17

Goldberg v. Kelly, 397 U.S. 254 (1970) 12

Gregory v. City of Chicago, 394 U.S. 111 (1969) 11

Griswold v. Connecticut, 381 U.S. 479 (1965) 15

Hall v. Cole, 412 U.S. 1 (1973) 13

Hormel v. Helvering, 312 U.S. 552 (1941) 15

Hughes v. Defender Association of Philadelphia, 509 F.Supp. 140 (E.D.Pa. 1981) 19

Michaelson v. United States, 266 U.S. 42 (1924) 14

Monk v. Roadway Express, Inc., 73 F.R.D. 411 (W.D.La. 1977), *vacated*, 599 F.2d 1378 (5th Cir. 1979) 10

Moran v. Dillingham, 174 U.S. 153 (1899) 20

Muniz v. Hoffman, 422 U.S. 454 (1975) 13

Nemeroff v. Abelson, 620 F.2d 339 (2d Cir. 1980) 12

NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975) ... 15

Nye v. United States, 313 U.S. 33 (1941) 14

Pabst Brewing Co. v. Brewery Workers Local No. 77 555 F.2d 146 (7th Cir. 1977) 11

Page v. A. H. Robins Co., Inc., 85 F.R.D. 139 (E.D.Va. 1980) 19

Parr v. United States, 363 U.S. 370 (1960) 11

TABLE OF AUTHORITIES (Continued)

Page

CASES (Continued)

Rexford v. Brunswick-Balke Co., 228 U.S. 339 (1913) ... 20

Rice v. McKenzie, 581 F.2d 1114 (4th Cir. 1978) 20

Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980) ... i,ii,6,10, 13,17

Robinson v. Ritchie, 516 F.Supp. 437 (E.D.Va. 1981) ... 17

Rosemont Enterprises, Inc. v. Random House, Inc., 261 F.Supp. 691 (S.D.N.Y. 1966) 14

In re Ruffalo, 390 U.S. 544 (1968) 11

Schleper v. Ford Motor Co., 585 F.2d 1367 (8th Cir. 1978) 11

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Matter of Shen, 7 Bankr. 942 (S.D.Cal. 1980) 1,6,7,13

Sibbach v. Wilson & Co., 312 U.S. 1 (1941) 15

Skinner v. White, 505 F.2d 685 (5th Cir. 1974) 11,13

Smoot v. Fox, 353 F.2d 830 (6th Cir. 1965), *cert. denied sub nom. League of Women Voters v. Smoot*, 384 U.S. 909 (1966) 13,17

Stewart v. Sonneborn, 98 U.S. 187 (1879) 12

Swann v. Charlotte-Mecklenburg Board of Education, 431 F.2d 135, 13 A.L.R. Fed. 850 (4th Cir. 1970) 20

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TABLE OF AUTHORITIES (Continued)

Page

CASES (Continued)

United States v. Lancaster, 5 Wheat. (18 U.S.) 434 (1820) 20

United States v. Mendenhall, 446 U.S. 544 (1980) 16

United States v. Peterson, 456 F.2d 1135 (10th Cir. 1972) 11

Westinghouse Credit Corp. v. Bader & Dufty, 627 F.2d 221 (10th Cir. 1980) 22

Youakim v. Miller, 425 U.S. 231 (1976) 16

In re Zweibon, 565 F.2d 742 (D.C. Cir. 1977) 18

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS

United States Constitution
- Fifth Amendment (due process) i,2,10,11,17
- Sixth Amendment (jury trial) i,2,13,14,15
- Seventh Amendment (jury trial) i,2,12,13, 14,15,17
- Ninth Amendment 15,16

Pre-Reform Bankruptcy Act
- Section 2(a)(8) [former 11 U.S.C. § 11(a)(8)] 3

Federal Criminal Code
- 18 U.S.C. § 402 14

TABLE OF AUTHORITIES (Continued)

Page

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS (Continued)

Judicial Code
28 U.S.C. § 47 ..... i,2,20,21
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1334 3
28 U.S.C. § 1920(5) 21
28 U.S.C. § 1924 5
28 U.S.C. § 1927 3,6,10

California Civil Code
Section 1717 6

Bankruptcy Rules
Rule 515 3

Federal Rules of Appellate Procedure
Rule 7 ..... i,3,19,20, 21,22,23,24
Rule 24 20,21
Rule 39 21

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Page

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner Michael Kaye respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 18, 1982.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of California is reported *sub nom. Matter of Shen* at 7 Bankr. 942 (S.D. Cal. 1980). The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 18, 1982. A timely petition for rehearing was denied on February 24, 1982, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

United States Constitution:

Fifth Amendment

> No person shall be . . . deprived of . . . liberty, or property, without due process of law. . . .

Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor. . . .

Seventh Amendment

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . .

United States Code, Title 28

§ 47. Disqualification of Trial Judge to Hear Appeal

> No judge shall hear or determine an appeal from the decision of a case or issue tried by him.

§ 1927. Counsel's Liability for Excessive Costs

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Federal Rules of Appellate Procedure

Rule 7. Bond for Costs on Appeal in Civil Cases

> The district court may require an appellant to file a bond or provide other security in such form and amount as it finds necessary to ensure payment of costs on appeal in a civil case. . . .

STATEMENT OF THE CASE

Petitioner represented former debtors Samuel Shen and Carolyn Shen in a Chapter XII bankruptcy proceeding. Respondent Theodore W. Graham was trustee of the Shen estate. Luce, Forward, Hamilton & Scripps was the trustee's counsel.

Petitioner filed a motion on behalf of the Shens to reopen their case for certain limited and specified purposes. The jurisdiction of the U.S. District Court to consider such a motion was based on 28 U.S.C. § 1334, Section 2(a)(8) of the pre-reform Bankruptcy Act [former 11 U.S.C. § 11(a)(8)], and Bankruptcy Rule 515.

The major purposes of reopening were: (1) to obtain a turnover order to compel Graham and Luce Forward to relinquish the books and records of the Shen estate, which the Shens needed for effective post-bankruptcy administration of their properties, (2) to set aside a release by which the Shens had given up their right to question Graham's and Luce

Forward's conduct in handling the estate, and (3) to surcharge Graham and Luce Forward for multiple breaches of fiduciary duty, including unconsented-to conflicts of interest in which they had acted to benefit secret clients of the Luce Forward firm to the detriment of the Shen estate. [*See* 1 *Excerpt of Record* 1-128 and 222-237; 6 *Excerpt of Record* 1788-1795 and 1811-1843.]

Luce Forward filed more than 1500 pages of memoranda, declarations, and exhibits in opposition to reopening the case. Its exhibits alone occupy the entirety of Volumes Two through Five of the record. [*See also* 1 *Excerpt of Record* 129-221; and 6 *Excerpt of Record* 1704-1714, 1743-1787, and 1807-1810.]

The hearing took place on July 7, 1980. At the outset, both the court clerk and the district judge specified that the purpose of the proceeding was to hear the debtors' motion. The court confined each side to 30 minutes of oral argument. [*See* R.T. 3:1-14 (July 7, 1980).]

At the conclusion of petitioner's presentation, counsel for Graham and Luce Forward stepped up and made an oral motion for attorney fee sanctions. He immediately submitted declarations requesting costs and attorney fees in the total amount of $36,339.29. Petitioner had already fully exhausted his oral argument time and was given no opportunity to respond. The declarations had not been served in advance. Petitioner had no opportunity to study them while oral argument was still in progress. [*See* R.T. 23:15 - 25:4 (July 7, 1980); and 6 *Excerpt of Record* 1796-1806.]

The oral motion for sanctions had not been preceded by any written notice of motion, notice of cross-motion, or order to show cause. The court itself had not made any reference to sanction proceedings in its own notice of hearing [6 *Excerpt of Record* 1742] or at the outset of oral argument [R.T. 3:1-14 (July 7, 1980)].

In their papers opposing the motion to reopen, Graham and Luce Forward had stated that they would seek sanctions by means of a bill of

costs procedure. [*See* 1 *Excerpt of Record* 129, 165:21-22.] Under *Local Rule* 265-1 of the U.S. District Court, Southern District of California, the bill of costs procedure comes only after judgment. The application must be preceded by written notice and accompanied by an itemized bill of costs. [*See also* 28 U.S.C. § 1924, requiring itemization and verification of any bill of costs.]

Luce Forward did not wait until judgment. It did not give advance written notice of its application. It did not itemize, document, or describe any part of its purported costs. It did not state the customary billing rates of its in-house counsel, nor did it give any breakdown of hours or description of services for its claimed in-house legal work. [*See* 6 *Excerpt of Record* 1796-1800.]

Luce Forward's outside counsel did partially document a fee claim in the amount of $4,470 and a claim for disbursements in the amount of $7.65. [*See* 6 *Excerpt of Record* 1801-1806.]

Petitioner had attended the July 7, 1980 hearing prepared to argue the merits of the Shens' motion to reopen, not to deal with unnoticed sanction proceedings. In any event, Luce Forward prevented response by withholding its oral motion for sanctions until after petitioner had used up his allotment of time.

Petitioner could not have raised personal defenses even if the Court had granted additional time to respond. The motion for sanctions was a direct attack on petitioner and a demand that petitioner be held personally liable for Luce Forward's alleged attorneys' fees and costs.

But petitioner's clients had previously given a written release to Graham and Luce Forward. The terms of that release provided that the Shens would be liable for attorneys' fees if they sought to set aside the release or to surcharge the trustee and his counsel for misconduct in the administration of the Shen estate. [*See* 1 *Excerpt of Record* 125, 126:29 - 127:4.]

California law automatically makes such contract provisions for attorneys' fees mutually reciprocal. *California Civil Code* § 1717. But the Shens had to prevail on their motion in order to avoid attorney fee liability.

Luce Forward's oral motion for sanctions created a conflict of interest between petitioner and his clients as to who would be liable for fees if the motion to reopen failed. It was too late for petitioner to withdraw, and petitioner could not speak out in his own defense without violating his primary obligation of undivided loyalty to the Shens.

The court signed its decision on September 10, 1980 but did not file it until September 16, 1980. [*See* Appendix 1, annexed to this petition, and 6 *Excerpt of Record* 1844, 1858:20.] During that interim, Congress amended 28 U.S.C. § 1927 on September 12, 1980 to specifically authorize the imposition of fee sanctions against counsel. The amended statute prescribes no procedure for the sanction assessment.

The court denied the Shens' motion to reopen, granted Luce Forward's oral motion for sanctions, and ordered petitioner to pay a fee and cost penalty in the amount of $36,339.29 for attempting to reopen the case in alleged bad faith. In doing so, the court relied on its inherent power under *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), rather than on the amended language of 28 U.S.C. § 1927. The Court also made the Shens jointly liable for the assessment. *Matter of Shen*, 7 Bankr. 942, 949 (S.D.Cal. 1980).

The court denounced petitioner's efforts as an "unreasonable and vexatious multiplication of the Shens' bankruptcy proceedings" and described the motion to reopen as a "frivolous," "willful and bad faith abuse" of judicial processes "bordering on attempted fraud upon the Court."

The district judge also accused petitioner of squandering the court's time in pursuit of a "manifestly unmeritorious" motion, thereby contributing to the "glacial pace" of modern litigation, breeding

"frustration with the federal courts, and ultimately disrespect for the law." The court questioned petitioner's legal ethics and recommended the initiation of disbarment proceedings.[1] *See Matter of Shen*, 7 Bankr. 942, 944 at text accompanying footnotes 1 and 2, 946, 949, and 950 (S.D.Cal. 1980).

Articles about the decision appeared immediately in the major San Diego metropolitan newspapers. *See Judge Denounces Shen Bid, Denies Bankruptcy Motion*, San Diego Union, September 17, 1980, at B5, col. 1; and *Shen Case Stirs Sharp Opinion by U.S. Judge*, San Diego Evening Tribune, September 17, 1980, at B1, col. 6.

The adverse publicity was ruinous to petitioner's law practice. [*See* "Declaration of Michael Kaye in Opposition to Luce Forward's Dismissal Motion," dated December 31, 1981.] The Shens had been petitioner's primary clients. For their own protection and to avoid any risk of conflict of interest, petitioner had to withdraw from representing them. Petitioner's credibility and effectiveness as an advocate have been deeply impaired, and he has been unable to rebuild any substantial practice.

Petitioner appealed on his own behalf to the U.S. Court of Appeals for the Ninth Circuit. Luce Forward moved to dismiss the appeal for purported mootness. On February 4, 1981, a motion panel denied Luce Forward's motion and authorized the appeal to proceed. [*See* Appendix 2, annexed hereto.]

On February 19, 1981, Luce Forward filed a motion in the District Court to require an appellate cost bond in the amount of $25,000. It estimated that it would incur $20,000 in attorney fees and $5,000 in costs in resisting the appeal.

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[1] For reasons unknown to petitioner, there has been no disciplinary investigation as yet. Petitioner has never been disciplined by any bar organization in this or any other matter.

Petitioner filed papers in opposition to the motion. The District Court took no immediate action. The parties proceeded to brief the appeal.

Luce Forward renewed its cost bond motion on July 24, 1981. It attached copies of both parties' appellate briefs for the District Court to review. The new motion reduced Luce Forward's bond request to $15,000. It gave no breakdown between costs and attorney fees.

Petitioner filed further opposition papers, noting *inter alia* that Luce Forward by then had incurred virtually all of its potentially taxable costs but had failed to itemize the exact amounts.[2]

The District Court took no action until October 5, 1981 — nearly 13 months after its initial decision. The Court then rejected Luce Forward's attorney fee demand but ordered petitioner to post a $5,000 cost bond on the basis of Luce Forward's original unitemized cost estimate. The bond order was not entered or mailed to the parties until October 29, 1981. [*See* Appendix 3, annexed hereto.]

Petitioner notified Luce Forward by letter dated November 12, 1981 that his law practice was in ruins and that he no longer owned or controlled anything close to $5,000 in assets. Local bonding agencies had refused to issue a bond without full collateral. [*See* Exhibit "B" attached to Luce Forward's "Motion to Dismiss for Failure to Post Cost Bond."]

Luce Forward waited until Christmas eve, less than two weeks before the scheduled date of oral argument on the merits of the appeal. It then served and filed a second dismissal motion, this time based on petitioner's failure to post the bond.

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[2] For a complete collection of Luce Forward's motion papers and petitioner's responses filed in the District Court in connection with the cost bond issue, *see* "Document Appendix in Support of Appellant's Cross-Motion to Reduce $5,000 Cost Bond or Waive Security for Costs," submitted to the Ninth Circuit on December 31, 1981.

Petitioner filed extensive and timely opposition papers on December 31, 1981. Those papers included a detailed declaration of his financial condition, a comprehensive brief on the cost bond issues, and a compilation of all the District Court filings which led up to the cost bond order.

Petitioner showed that the $5,000 bond assessment substantially exceeded his financial resources. But he also demonstrated that any cost award potentially taxable in Luce Forward's favor would not reasonably exceed $300. That amount was well within petitioner's ability to pay. Petitioner could neither post the bond nor qualify to proceed *in forma* pauperis.[3]

Luce Forward's eleventh hour dismissal motion was forwarded from the Ninth Circuit Clerk's office in San Francisco to the appellate panel in Los Angeles. Petitioner's response papers were not.

On January 5, 1982, the panel refused to hear oral argument on the merits of the appeal. Instead it announced a summary dismissal of the appeal on the basis of Luce Forward's motion papers alone. The Court entered a formal dismissal order on January 18, 1982. [*See* Appendix 4, Annexed hereto.]

Petitioner made timely application for a rehearing, which the Court of Appeals denied by order dated February 24, 1982. [*See* Appendix 5, annexed hereto.]

Luce Forward was entitled to costs upon dismissal. But it never applied for and never documented those costs.

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[3] *See* (1) "Appellant's Opposition to Luce Forward's Dismissal Motion and Appellant's Cross-Motion to Reduce $5,000 Bond or Waive Security for Costs," and (2) "Declaration of Michael Kaye in Opposition to Dismissal Motion," dated December 31, 1981.

REASONS FOR GRANTING THE WRIT

A. Review Should Be Granted To Establish Procedural Standards For The Imposition Of Attorney Fee Sanctions Under *Roadway Express, Inc. v. Piper*

In *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), this Court reaffirmed the inherent power of the federal judiciary to impose attorney fee sanctions against lawyers who commence or conduct litigation in bad faith. Congress supplied a statutory foundation for that power when it amended 28 U.S.C. § 1927 on September 12, 1980, by Public Law 96-349, § 3, 94 Stat. 1156.

Neither *Roadway Express* nor the amended statute spell out procedural standards which federal courts should observe before assessing sanctions. But this Court has cautioned that "[b]ecause inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion." *Roadway Express, Inc. v. Piper*, 447 U.S. at 764. "Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." *Id.*, 447 U.S. at 767.

The procedural history of *Roadway Express* gave no occasion to discuss due process requirements at any length. The District Court had severed the sanction proceedings from any hearing involving the merits of the case in chief. An order to show cause preceded the sanction hearing by more than three months. The accused attorneys were allowed to withdraw as counsel in order to avoid any potential conflict of interest with their clients, and the Court extended additional time to permit discovery with respect to the costs and attorney fees in question.

The attorneys had the benefit of "an evidentiary hearing" on the imposition of sanctions. They apparently raised no due process or jury trial issues at any stage of the litigation. *See* the lower court opinions *sub nom. Monk v. Roadway Express, Inc.*, 73 F.R.D. 411, 413 (W.D. La. 1977), *vacated*, 599 F.2d 1378, 1380-1381 (5th Cir. 1979).

But the present case demonstrates the risk of serious procedural unfairness where sanctions are imposed without sensitivity to constitutional standards. Here, the sanction proceedings intruded into a hearing on the merits; there was no advance notice that the hearing would include sanction matters; petitioner had no opportunity to withdraw to avoid a potential conflict of interest with his clients; there was no provision for discovery and no opportunity to call, confront, examine, or cross-examine witnesses.

The District Court conducted only a unilateral hearing on sanctions, because Luce Forward strategically withheld its sanction motion and delayed the service and filing of its fee and cost declarations until after petitioner had fully exhausted his allotted 30 minutes of oral argument. Petitioner devoted his time to the merits of his own clients' motion. He had no opportunity to respond to Luce Forward's procedural ambush.

It would be a denial of due process to penalize an accused person for an offense not properly charged. *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969); *Parr v. United States*, 363 U.S. 370, 394 (1960). Time and again, this Court has said that fair notice must apprise the accused of the specific charges against him and must inform him of the time and place of the hearing far enough in advance to afford an adequate opportunity to prepare a defense. *See, e.g., In re Ruffalo*, 390 U.S. 544, 550-552 (1968); *Ex Parte Bradley*, 7 Wall. (74 U.S.) 364, 372-373 (1868).

Notice is defective if it fails to specify the charges or if new charges suddenly spring up at a hearing that was duly noticed on different grounds or for a different purpose. *Schleper v. Ford Motor Co.*, 585 F.2d 1367, 1372 (8th Cir. 1978); *Pabst Brewing Co. v. Brewery Workers Local No. 77*, 555 F.2d 146, 150-151 (7th Cir. 1977); *Skinner v. White*, 505 F.2d 685, 690-691 (5th Cir. 1974); *United States v. Peterson*, 456 F.2d 1135 (10th Cir. 1972).

Where important interests are at stake, due process contemplates more than mere propriety of notice. It also requires an opportunity to confront

and cross-examine adverse witnesses. *Goldberg v. Kelly*, 397 U.S. 254, 269-270 (1970). The proceedings below afforded no such hearing.

The District Court took triable issues of fact and summarily resolved those issues against petitioner. The result, in effect, became a summary judgment for malicious prosecution, abuse of process, or criminal contempt. The penalty descended on petitioner without proper notice, without regular pleadings, without discovery, without trial by jury, and indeed without any proper trial or adequate hearing at all.

A claim is made in "bad faith" when it is (1) entirely without color, and (2) made for reasons of harassment or delay or for other improper purposes. *Nemeroff v. Abelson*, 620 F.2d 339, 348-349 (2d Cir. 1980). That definition is a leading guideline for the imposition of federal fee sanctions.

But the definition of bad faith in *Nemeroff v. Abelson* also corresponds to the two substantive elements of malicious prosecution. A claim that is entirely without color is a claim which lacks probable cause. *See Tool Research & Engineering Corp. v. Henigson*, 46 Cal.App.3d 675, 682-684, 120 Cal.Rptr. 291, 296-298 (1975) (malicious prosecution action against attorney). And the malice required in an action for malicious prosecution "exists when the proceedings are instituted primarily for an improper purpose." *Albertson v. Raboff*, 46 Cal.2d 375, 383, 295 P.2d 405, 410 (1956) (per Traynor, J.).

"[A] request for attorneys' fees under the bad faith exception is really a malicious prosecution suit in disguise. . . ." Comment, *Nemeroff v. Abelson, Bad Faith, and Awards of Attorneys' Fees*, 128 U.Pa.L.Rev. 468, 482 (1979).

Historically, the Seventh Amendment has guaranteed the right to jury trial in malicious prosecution cases. *See, e.g., Stewart v. Sonneborn*, 98 U.S. 187 (1879); 5 J. Moore, J. Lucas & J. Wicker, *Moore's Federal Practice* par. 38.11[5] at fn. 12 (2d ed. 1980). The invention of new procedures cannot defeat jury trial rights that are rooted in traditional

tort practice. *Compare Atlas Roofing Co. v. Occupational Safety Commission*, 430 U.S. 442, 458-459 (1977), *with Curtis v. Loether*, 415 U.S. 189, 195-196 (1974).

For that reason, the Sixth Circuit in a pre-*Roadway* case concluded that federal courts do not have inherent power to impose bad faith fee sanctions under the guise of fixing costs because to do so would be equivalent to rendering a tort judgment without trial by jury. *Smoot v. Fox*, 353 F.2d 830, 833 (6th Cir. 1965), *cert. denied sub nom. League of Women Voters v. Smoot*, 384 U.S. 909 (1966).

Roadway Express superseded *Smoot* to the extent of authorizing fee sanctions. But this Court has not yet addressed the Seventh Amendment issue posed by *Smoot*.

Furthermore, the right to jury trial in at least some "bad faith" cases may also arise under the Sixth Amendment. The District Court repeatedly condemned petitioner for alleged misconduct "bordering on attempted fraud upon the Court." *Matter of Shen*, 7 Bankr. 942, 944, 946 (S.D.Cal. 1980). A charge of "fraud on the court" implies a direct insult to the court's dignity and authority. It is an accusation of criminal contempt. *Skinner v. White*, 505 F.2d 685, 689 (5th Cir. 1974).

Attorney fee sanctions, like criminal contempt sanctions, are punitive in purpose. *Hall v. Cole*, 412 U.S. 1, 5 (1973). Courts are not exempt from Sixth Amendment restraints when they exercise an inherent power to impose punishment. *Bloom v. Illinois*, 391 U.S. 194 (1968) (criminal contemnor cannot be sentenced to more than six months in jail without the procedural safeguard of trial by jury).

There was no jail sentence in the case at bar. But the court levied sanctions against petitioner in the amount of $36,339.29. In *Muniz v. Hoffman*, 422 U.S. 454, 476-477 (1975), this Court expressly reserved the question whether an individual in a criminal contempt case would be entitled to trial by jury if faced with the risk of a substantial fine. Several lower courts have answered that question in the affirmative. *See, e.g.*,

Girard v. Goins, 575 F.2d 160, 162-165 (8th Cir. 1978); and *Douglass v. First National Realty Corp.*, 543 F.2d 894 (D.C. Cir. 1976) (jury trial required if fine exceeds $500).

The fact that a private party prosecuted the contempt and was awarded the fine does not defeat the character of the sanction as a punishment for criminal contempt. *See Nye v. United States*, 313 U.S. 33, 41-43 (1941); *Michaelson v. United States*, 266 U.S. 42, 65 (1924); and 18 U.S.C. § 402.

The penalty in this case was the functional equivalent of both a tort judgment and a criminal contempt fine. Petitioner had a right to trial by jury under both the Sixth and the Seventh Amendments. He never waived that right.

This Court should prescribe the following procedural safeguards for fee sanction cases:

1. The sanction proceedings should be severed or bifurcated from any hearing on the merits in the case in chief. Otherwise, meretricious demands for fee sanctions may become a routine litigation tactic to chill the opposition, drive a wedge between attorney and client, obfuscate the issues on the merits, and distract and confuse the trier of fact. That is why counterclaims for malicious prosecution have traditionally been disallowed. *See Babb v. Superior Court*, 3 Cal.3d 841, 844, 847-848, 479 P.2d 379, 380, 382, 92 Cal.Rptr. 179, 180, 182 (1971); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 261 F.Supp. 691, 695, 696-698 (S.D.N.Y. 1966); Note, *Counterclaim for Malicious Prosecution in the Action Alleged to be Malicious*, 58 Yale L.J. 490, 493 at text accompanying fn. 12 (1949).

2. The accuser should provide an exact specification of charges and advance notice of the hearing at which those charges will be considered.

3. The accused party or attorney should have a right to call and examine favorable witnesses and to confront and cross-examine adverse witnesses.

4. Where the demand for sanctions is equivalent to a tort claim for malicious prosecution or abuse of process, there should be a right to jury trial under the Seventh Amendment.

5. Where the court accuses an attorney of serious misconduct which threatens the dignity and authority of the tribunal and where the prospective penalty may exceed $500, the accused should have a right to trial by jury under the Sixth Amendment.

B. Pretermission Of Issues By the Ninth Circuit Does Not Preclude Review Where The Issues Were Presented Below, Are Ripe For Decision, And Are Important To The Administration Of Justice

Both parties fully briefed the due process and jury trial issues discussed in the preceding section of this petition. But the Ninth Circuit pretermitted those issues, dismissing petitioner's appeal without reaching either the major procedural questions or the underlying issues on the merits.

The general rule is that this Court does not grant certiorari to review questions which the Court of Appeals has failed to address or resolve. That rule has sometimes applied even when the parties carefully raised and briefed a pretermitted issue in the lower court. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975).

But the rule against reviewing pretermitted issues is not inflexible. It does not apply where the obvious result would be a plain miscarriage of justice. *Hormel v. Helvering*, 312 U.S. 552, 555-558 (1941). The Court may always take notice of fundamental error even where the parties have failed to make objection below. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 16 (1941).

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), this Court recognized the Ninth Amendment as an important foundation of the right to privacy

even though Ninth Amendment issues had not been raised at the trial. *See* Emerson, *Nine Justices in Search of a Doctrine*, 64 Mich. L.Rev. 219, 227 (1965). And in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), this Court overruled a prior decision of many years' standing on a basis neither urged below nor pressed by the parties in their Supreme Court arguments. *See Blorder-Tongue v. University Foundation*, 402 U.S. 313, 320-321 fn. 6 (1971).

More recently, this Court has considered new issues raised for the first time on appeal or certiorari in *United States v. Mendenhall*, 446 U.S. 544, 551-552 fn. 5 (1980); *Carlson v. Green*, 446 U.S. 14, 17 fn. 2 (1980); and *Youakim v. Miller*, 425 U.S. 231, 233-234 (1976).

There are two reasons for the policy against reviewing pretermitted issues. In the first place, that policy enforces sound judicial administration. It prevents tactical "sandbagging" by unscrupulous counsel. It forces the parties to lay out all their cards at once, to introduce all material evidence at the outset, and to raise all meritorious arguments so that the lower courts will have a maximum opportunity to reach a proper disposition of the case in the first instance. No lawyer has a right to store evidentiary or analytical aces up his sleeve. An effective presentation of all issues in the lower court will often make certiorari review unnecessary.

That purpose is not served by declining review where (1) a party was deprived of proper notice, hearing, or trial in the initial forum, or (2) where important issues were conscientiously raised and argued by the parties below but were pretermitted by the lower court. Inferior tribunals should not be allowed to evade review by a flagrant denial of due process or by suppression, circumvention, or glossing over of important questions duly presented.

A second purpose of the rule against reviewing pretermitted issues is to protect this Court from having to rule on important and difficult questions without the benefit of a preliminary judicial analysis. Emerging principles of law need time for seasoning before they ripen for final

disposition. The highest court of the land should not have to sail on an uncharted sea or blaze new paths through an unexplored wilderness.

Lower courts play an important role in preparing the way. Even when they err, their preliminary forays are like flares in the night. Their tentative first analysis at least lights up the contours of the land. But that preliminary sifting of issues by the court below is not indispensable where other courts and scholarly commentators have already performed an equivalent first analysis.

This Court itself has already warned that fair notice and hearing are essential in fee sanction cases. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980). On the basis of that cautionary dicta, at least one Court of Appeals has already reversed a fee penalty where the sanctions had been imposed without a proper hearing. *Glass v. Pfeffer*, 657 F.2d 252, 257-258 (10th Cir. 1981).

A district judge has already noted with alarm the danger that fee sanction proceedings will have the effect of driving a wedge between attorney and client. *Robinson v. Ritchie*, 516 F.Supp. 437, 439-440 (E.D.Va. 1981). *See also Babb v. Superior Court*, 3 Cal.3d 841, 847-848, 479 P.2d 379, 382, 92 Cal.Rptr. 179, 182 (1971). It is that ominous potential conflict which justifies procedural bifurcation to isolate sanction proceedings from any hearing on the merits.

The Sixth Circuit has already developed an analysis of fee sanctions with an eye toward the Seventh Amendment right to jury trial. *Smoot v. Fox*, 353 F.2d 830, 833 (6th Cir. 1965), *cert. denied sub nom. League of Women Voters v. Smoot*, 384 U.S. 909 (1966).

The California Supreme Court will issue a decision in the near future that is expected to include a major analysis of the due process issues involved in the summary assessment of fee sanctions against counsel without notice or hearing. The title of the case is *In re Marriage of Flaherty*, S.F. 24307 (argued October 1, 1981). *See* Carrizosa, *High*

Court Tackles Worrisome Issue of Frivolous Appeals, Los Angeles Daily Journal, September 29, 1981, at 1, col. 4.

Meanwhile, student commentators are actively assaying the field. *See, e.g.*, Comment, *Awards of Attorneys' Fees Against Attorneys: Roadway Express, Inc. v. Piper*, 60 B.U.L.Rev. 950 (1980); Comment, *Nemeroff v. Abelson, Bad Faith, and Awards of Attorneys' Fees*, 128 U.Pa.L.Rev. 468 (1979); Comment, *Groundless Litigation and Malicious Prosecution Debate: A Historical Analysis*, 88 Yale L.J. 1218 (1979).

The sanctions against petitioner came without proper notice, hearing, or trial. There is a presumption against waiver of those procedural rights whether or not formal objection was raised in the District Court. *Aetna Insurance Co. v. Kennedy*, 301 U.S. 389, 393 (1937); *Girard v. Goins*, 575 F.2d 160, 162-163 (8th Cir. 1978); *In re Zweibon*, 565 F.2d 742, 746-747 (D.C. Cir. 1977). Such exceptional irregularities are subject to this Court's power to notice plain error. R. Stern & E. Gressman, *Supreme Court Practice* § 6.27 at 460 (5th ed. 1978).

Petitioner conscientiously raised and fully briefed those procedural issues in the Court of Appeals. Despite pretermission of those issues by the Ninth Circuit, ample preliminary analysis of every major issue is available from other courts and commentators.

Petitioner has narrowly restricted his choice of issues at this stage to avoid drawing the Court into the quicksands of disputed fact. The issues are procedural. They are sufficiently ripe. Their resolution is important, beyond the immediate case, to the sound administration of justice in the federal courts. There is no compelling policy reason to refuse review.

C. Review Is Warranted To Determine Whether District Courts Must Fix Cost Bond Assessments Under Rule 7 Of The Federal Rules Of Appellate Procedure At Amounts Reasonably Related To Actual Costs Or Whether Exaggerated Assessments Are Permissible To Deter Or Obstruct Appeals Alleged To Be Frivolous

If this Court is reluctant to address the foregoing due process and jury trial issues in the first instance, this case presents one further question which is fully ripe and sufficiently important to justify review at this time.

The cost bond issue is amenable to summary disposition. On that issue alone, the Court could appropriately grant certiorari, summarily reverse, and remand to the Ninth Circuit for a full decision both on the remaining procedural issues raised here and on the merits.

Prior to 1979, Rule 7 of the Federal Rules of Appellate Procedure fixed the cost bond in every civil appeal at a uniform rate of $250. But the amended rule now in effect leaves the amount of the bond to the discretion of the District Court.

The Rule 7 issue posed by this case is whether District Courts may adjust the bond amount on the basis of their evaluation of the merits of an appeal rather than on a reasonable approximation of actual costs.

Several district judges have assumed that the amended version of Rule 7 gives them a screening prerogative. They think it is their duty to impose high cost bonds to deter frivolous appeals and low cost bonds to encourage meritorious appeals. *See, e.g., Hughes v. Defender Association of Philadelphia*, 509 F.Supp. 140, 142-143 (E.D.Pa. 1981); and *cf. Page v. A. H. Robins Co., Inc.*, 85 F.R.D. 139, 140 (E.D.Va. 1980).

Those decisions are wrong for two reasons. In the first place, the legislative history of the amended rule says nothing about a screening function. The revisers abandoned the old $250 amount because "[t]oday

it bears no relationship to actual costs." 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* par. 207.01[4] (2d ed. 1980). The $250 figure "was hopelessly out of date and any other specific figure would have been completely arbitrary." R. Stern, *Appellate Practice in the United States* 108 (1981).

If the revisers had intended to establish a screening authority, so significant a change would have been reflected in the legislative history and in new procedural protections to safeguard against any abuse of discretion in the screening process.

Rule 24(a) of the Federal Rules of Appellate Procedure specifically authorizes District Courts to examine the merits of pending appeals in *forma pauperis* cases and to certify whether or not such appeals are taken in good faith. But that authority is hedged about with procedural safeguards, including a specific and rapid prescribed procedure for appellate review. No such guidelines for review appear in Rule 7. None were needed, because that rule never contemplated merits screening.

A second reason why district judges may not screen appeals is that to do so would implicate them as direct participants in review of their own decisions. Such an intrusion on the appellate domain is impermissible. *See Rexford v. Brunswick-Balke Co.*, 228 U.S. 339, 343-344 (1913); *Moran v. Dillingham*, 174 U.S. 153, 156-157 (1899); *United States v. Lancaster*, 5 Wheat. (18 U.S.) 434 (1820); *Rice v. McKenzie*, 581 F.2d 1114, 1116-1118 (4th Cir. 1978); *Swann v. Charlotte-Mecklenburg Board of Education*, 431 F.2d 135, 136-137, 13 A.L.R.Fed. 850 (4th Cir. 1970).

"No judge shall hear or determine an appeal from the decision of a case or issue tried by him." 28 U.S.C. § 47. That prohibition should reasonably extend to any screening authority over appeals. Otherwise every district judge would become, in effect, a fourth member of the appellate panel reviewing his own decisions. By flagging an appeal as frivolous and setting an insurmountable cost bond, the district judge would be in a position to virtually foreclose the appeal and thereby determine its outcome.

That potential conflict with the prohibitions of 28 U.S.C. § 47 is barely avoided under Rule 24 by requiring the district judge to state his reasons in writing and by spelling out a procedure for rapid and independent appellate review. No such saving grace appears in Rule 7.

The purpose of a cost bond is to assure payment of appellate costs in a civil case in the event an appeal fails. Only the appellant is ever required to post such a bond. The exclusive purpose of the bond is to protect the appellee. 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* par. 207.02 (2d ed. 1980).

Not all taxable costs can be counted in computing the proper amount of a cost bond. Filing fees, docket fees, costs of printing the record and premiums paid for supersedeas or other bonds are taxable against an appellee under 28 U.S.C. § 1920(5) and Rule 39(c) and (e) of the Federal Rules of Appellate Procedure if an appeal succeeds. But those items are not taxable against an appellant if an appeal fails. Those costs are paid initially by the appellant out of his own pocket. The successful appellee never incurs those costs and does not need security to assure reimbursement of expenses he never paid. *See* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3953 at 379 fn. 5 (1977).

The only items that should be taken into account in determining the proper amount of a cost bond are the costs of (1) reporters' transcripts, (2) the clerk's record, and (3) printing the appellee's briefs at rates not higher than those generally charged for such work in the area where the clerk's office is located." *Rule* 39(c).

A motion to fix security for costs should be supported by "a realistic estimate" of the actual costs that would be taxable in the appellee's favor in the event of affirmance. D. Knibb, *Federal Court of Appeals Manual* § 10.1 at 114 (1981).

Luce Forward never itemized its $5,000 cost estimate. Petitioner, on the other hand, demonstrated that the costs potentially taxable in Luce Forward's favor would not equal even one tenth of respondents'

exaggerated demand. [*See* "Document Appendix in Support of Appellant's Cross-Motion to Reduce $5,000 Cost Bond or Waive Security for Costs," at 2, 4:28-32; at 6, 17:9 - 20:17; and at 31, 32:10-15.]

There was no trial in this case. The hearing transcripts were minimal. Luce Forward xeroxed and velobound its briefs in very presentable but inexpensive fashion. The only substantial cost was for printing the record. But that expense was borne by petitioner, not by Luce Forward.

Nevertheless, the District Court embraced Luce Forward's pumped-up estimate and brushed off petitioner's strong showing that the $5,000 cost figure was a grossly unrealistic exaggeration. A reasonable inference that can be drawn from the $5,000 bond order is that the District Court must have accepted Luce Forward's characterization of the appeal as "frivolous." [*See* "Document Appendix in Support of Appellant's Cross-Motion to Reduce $5,000 Bond," *supra*, at 2, 3:21-23.]

The Court therefore imposed a Rule 7 cost bond equal to the highest amount that had ever previously been approved in a reported opinion. *See Westinghouse Credit Corp. v. Bader & Dufty*, 627 F.2d 221, 224 (10th Cir. 1980).

That amount was beyond petitioner's financial resources. [*See* "Declaration of Michael Kaye in Opposition to Luce Forward's Dismissal Motion," dated December 31, 1981.] On the other hand, petitioner could not qualify to proceed *in forma pauperis* because he freely conceded that actual costs would be well within his ability to pay. *See Adkins v. DuPont Co.*, 335 U.S. 331, 339 (1948).

Petitioner could pay actual costs. But he could not post an exaggerated bond set arbitrarily at more than ten times any realistic estimate of what those actual costs would be. The bond order became a technical pretext to torpedo petitioner's appeal.

That is the precise result Luce Forward sought. Cost reimbursement was not its objective. Luce Forward didn't even apply for costs after the

dismissal. Indeed, a cost application would have embarrassed Luce Forward by confirming the enormous discrepancy between its actual costs and the amount of the bond order.

A security bond which, for all practical purposes, denies a party his day in court, "transcends the bounds of sound judicial discretion." The discretion of the District Courts to issue orders for security contemplates only such orders "as will facilitate, not hamper, the administration of justice." *Farmer v. Arabian American Oil Company*, 285 F.2d 720, 721, 722 (2d Cir. 1960).

In most appeals today, no bond for costs is requested or filed. Dismissal for failure to post a bond is a rare and extreme sanction. D. Knibb, *Federal Court of Appeals Manual* § 10.1 at 113-114 (1981).

The Ninth Circuit summarily dismissed the appeal, faulting petitioner for failing to make a timely motion to reduce the bond. [*See* Appendix 4, annexed hereto.] But Rule 7 neither prescribes nor authorizes any such motion procedure. The customary practice has always been to wait for a dismissal motion and respond to that. *See, e.g., Carr v. Grace*, 516 F.2d 502, 504 (5th Cir. 1975); and *Settler v. Yakima Tribal Court*, 419 F.2d 486, 487 fn. 2 (9th Cir. 1969) *cert. denied*, 398 U.S. 903 (1970).

The leading treatises about how to reduce an inordinate Rule 7 bond. *See, e.g.*, 9 J. Moore, B. Ward, & J. Lucas, *Moore's Federal Practice* par. 207.02 (2d ed. 1980); and 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3953 (1977).

The Rule 7 issue is amenable to summary disposition if this Court so prefers. In that event, the Court should hold as follows:

(1) The sole function of the District Court under Rule 7 is to set the cost bond at an amount approximating as closely as possible the actual costs that would be taxable against the appellant if the appeal fails. The bond should be based on an itemization of actual costs, where available, otherwise on credible and realistic estimates.

(2) It is an abuse of discretion for the District Court to fix the bond amount by any other standard. In particular, the District Court should not adjust the bond upward or downward to correspond to its view of the merits of the appeal.

(3) The Court should establish an appropriate procedure [*e.g.*, by motion, extraordinary writ, appeal, or merely waiting to oppose a dismissal motion] for appellants to follow in the future in seeking review of excessive Rule 7 bonds.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari to review all issues presented.

The Court may prefer to remand to the Ninth Circuit to rule on the due process and jury trial issues in the first instance. In that event, review may be limited here to the Rule 7 question, and on that issue the judgment below should be summarily reversed or vacated.

Dated: May 24, 1982

Respectfully submitted,

/s/
MICHAEL KAYE

Petitioner Pro Se

APPENDICES

APPENDICES

		Page
1.	District Court Opinion, filed and entered September 16, 1980	1-1
2.	Ninth Circuit Order, denying appellees' motion to dismiss for mootness, filed February 4, 1981	2-1
3.	District Court Memorandum and Order, fixing appellate cost bond at $5,000, filed October 5, 1981 and entered October 29, 1981	3-1
4.	Ninth Circuit Order, dismissing appeal, filed January 18, 1982.....	4-1
5.	Ninth Circuit Order, denying petition for rehearing, filed February 24, 1982.....	5-1

FILED
ENTERED
LODGED

SEP 16 1980

CLERK, U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

SEP 1 1980

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

In the Matter of	Chapter XII
SAMUEL T. H. SHEN	Bankruptcy Nos. 74-607-K
and	74-608-K
CAROLYN JEAN SHEN,	OPINION
Debtors.	

Incredibly, after six years of proceedings in the bankruptcy court involving seventeen different appeals and eight different lawyers for the bankrupts, Mr. and Mrs. Samuel T. H. Shen, ex-debtors, and Mr. Michael Kaye, their lawyer, have moved, pursuant to Bankruptcy Rule 515, to reopen the bankruptcy proceedings in order to charge the Trustee in Bankruptcy, Mr. Theodore Graham, and his counsel, the law firm of Luce, Forward, Hamilton and Scripps, with certain acts of misconduct. The bankruptcy proceedings were dismissed voluntarily on December 20, 1979, several months after the Shens and Mr. Kaye had executed in the presence of the court a release of the very claims and demands against the Trustee and his counsel which are herein asserted as grounds for the motion to reopen. When stripped of the ill-supported arguments urged on this Court by Mr. Kaye, the feeble excuse which underlies his outrageous attempt to set aside the release is that he exercised "poor judgment" in signing the release and disavowing participation in any

further proceedings to challenge the release. We might add that he has exercised even worse judgment in attempting to repudiate his signature and in unashamedly abusing the processes of the courts. Mr. Kaye's initiation and pursuit of the present motion raises a substantial question as to his legal ethics[1] as well as his right to continue to practice before this Court.[2] This Court finds that the motion is an unreasonable and vexatious multiplication of the Shen's bankruptcy proceedings, is an abuse of the Court's processes, and is frivolous, bordering on an attempt to have the Court become a party to fraud. The Court futher finds that the Shens and Mr. Kaye have willfully and in bad faith committed this abuse. For these reasons, and those set forth below, the motion to reopen is denied, and attorneys' fees and costs incurred by Mr. Graham and the firm of Luce, Forward, Hamilton and Scripps in connection with the instant motion are assessed jointly and severally against the Shens and Mr. Kaye in the amount of $36,339.29.

I

Only the details of the labyrinthine bankruptcy proceedings most pertinent to the motion presently under consideration are here discussed. In March, 1974, the Shens first sought relief under the federal bankruptcy laws by filing a petition for relief under Chapter XII of the Bankruptcy Act. Theodore Graham was appointed operating trustee shortly after the filing of the initial Chapter XII petition. The firm of Luce, Forward, Hamilton and Scripps, in which Mr. Graham is a partner, was appointed counsel to Mr. Graham throughout his tenure as Trustee. On November 7, 1975, the Shens were adjudicated bankrupts. On June 4, 1976, Mr. and Mrs. Shen filed a petition for arrangement under Chapter XI of the Bankruptcy Act and were again adjudicated bankrupts shortly thereafter. Mr. Graham proffered his resignation as Trustee of the Shen estate to the bankruptcy court on October 31, 1978, and the court accepted his resignation on November 9, 1978. On March 26, 1979, Martin Goldberg, the special auditor appointed by the bankruptcy court, filed his report approving the Trustee's handling of the Shen estate. An order formally discharging Mr. Graham as Trustee was

entered on May 18, 1979. In his Memorandum of Opinion Re: Fee Applications dated July 18, 1978, Judge Katz noted the following:

> "Suffice it to say that at the commencement of these proceeding the debtors were insolvent in every sense of the word. Today, some four years later, all unsecured creditors have been paid in full with interest, the so called 'equity claimant' class of creditors has been satisfied, the secured creditor problems are basically resolved, and the debtors have an estate, net to them, approximating over $1 million.
>
> It cannot be gainsaid that the inflationary real estate market in Southern California was at least in part responsible for this success. However, it is also due in large measure to the efforts of Mr. Graham who undertook to resolve many of the problems facing the debtors and, in my opinion did so with a view in mind of serving the interests of his constituency, namely the creditors, while at the same time protecting the debtors. He did this in the face of numerous changes of counsel for the debtors as well as the oft evident contrariness of Mr. Shen."

The Shens again filed a Chapter XII petition on November 21, 1979, and voluntarily dismissed the bankruptcy proceedings on December 20, 1979.

After Mr. Graham's resignation as Trustee, he and his law firm sought collection of fees and determination of any claims the Shens might have against them arising from the fulfillment of their respective duties to the Shen estate during the period of the Graham trusteeship. These issues were resolved through a settlement, the terms of which were embodied in a stipulated order signed by Judge Katz and approved by the Shens and their attorney Michael Kaye on April 20, 1979. The signatures of Samuel T. H. Shen, Carolyn Jean Shen, and Michael Kaye all appear on an attachment to Judge Katz' order indicating that the stipulated order was approved *both as to form and content*, and that all rights of appeal and reconsideration of the order were waived. The findings of fact incorporated in Judge Katz' order included the following:

"2. The Trustee's final report and account is accurate and proper.

3. The Trustee has satisfactorily performed all of the duties required of him under the National Bankruptcy Act, the Rules promulgated by the United States Supreme Court, and all orders and judgments of this Court.

4. SAMUEL T. H. SHEN and CAROLYN JEAN SHEN released the Trustee and his counsel of their own free will without undue influence being exerted upon them.

5. The release attached hereto is fair to SAMUEL T. H. SHEN and CAROLYN JEAN SHEN, debtors and debtors-in-possession herein.

6. SAMUEL T. H. SHEN and CAROLYN JEAN SHEN have received the advice of competent counsel regarding the release.

• • • • •

9. The withdrawals, dismissals and release by the debtors and debtors-in-possession are reasonable and appropriate. The offer by the Trustee and his counsel is reasonable and appropriate. Such withdrawals, dismissals, release and offer will substantially reduce the litigation and administrative expenses in these proceedings and will resolve all disputes and claims, known or unknown, arising directly or indirectly out of these proceedings and will resolve all disputes and claims, known or unknown, arising directly or indirectly out of these proceedings between the debtors and the Trustee or his counsel, all as more specifically set forth in the release attached hereto."

Judge Katz' conclusions of law included the following:

"1. The release attached hereto is legally binding and enforceable according to its terms.

2. The fees and costs awarded by the provisions hereinbelow are reasonable in all respects.

3. The Trustee's Report and Account is accurate and proper and no liability of the Trustee nor his counsel has been established with respect to matters referred to in said Report and Account and no evidence has been offered to establish the same."

Following his findings of facts and conclusions of law, Judge Katz ordered, among other things:

"That LUCE, FORWARD, HAMILTON & SCRIPPS and each of its partners and associates, THEODORE W. GRAHAM, individually and as Trustee of the above-named debtors in any and all proceedings under the National Bankruptcy Act, including the Chapter XII proceedings, the straight bankruptcy proceedings, and the converted Chapter XII proceedings, and the agents, employees, successors and assigns of each of them are released and forever discharged from any and all liability, claims, demands, actions, and causes of action, known or unknown, of every kind, description and nature, now existing or hereafter arising which SAMUEL T. H. SHEN, CAROLY JEAN SHEN, as bankrupts, debtors-in-possession or the successors or assigns of either of them have at any time held, presently hold, or with the passage of time will hold, all as more particularly set forth in the release attached hereto and incorporated herein by this reference; if there be any conflict between the terms hereof and said release, the terms of the release shall control."

The settlement further encompassed a release which was referred to in Judge Katz' order and signed by both Mr. and Mrs. Shen. The release is, in Mr. Kaye's terms, a "comprehensive exculpatory instrument." It

provides that both Mr. Graham and the Luce, Forward firm "are hereby released and forever discharged from any and all liability, claims, demands, actions, and causes of actions, known or unknown, of every kind, description and nature, now existing, or hereafter arising which claims have been held, are presently held, or with the passage of time will be held by the Releasing Parties or any of them."

The release also provided that the parties had executed the release of their own free will, were not acting under undue influence, and that they had consulted with counsel and received advice regarding the execution of the release. The final paragraph of the release was the following attorneys' fees provision:

> "7. In the event either of the Releasing Parties later attempts to set aside this release, claim that this release is unenforceable, in whole or in part, or seeks to impose liability upon any of the Released Parties with respect to the matters released under this release, all Releasing Parties jointly and severally agree to pay any and all attorneys' fees incurred by one or more of the Released Parties in their attempts to establish the effectiveness or application of this release."

At the time the release was executed, Mr. Kaye stated in open court that he would never appear to challenge the release which he had approved by signing it.[3] Nonetheless, Mr. Kaye filed the present motion and appeared at the hearing to represent the Shens, at which time he indicated that he wished to repudiate the signature he had made earlier in open court. His motivation for so doing was set forth in his affidavit, which makes clear that he now has concluded that execution of the release by him and his approval of it represented poor judgment on his part.

All agree that the Shen's estate is now fully solvent. The Shens do not seek to have the bankruptcy court resume general administration over the Shen's property. Rather, they seek a variety of sanctions against Mr.

Graham and his law firm on a number of grounds, which include refusal to surrender books and records of the estate, concealment of records, illegal seizure of mail, failure to disclose conflicts of interest, filing of false accounts, breach of fiduciary duty, and fraud on the bankruptcy court, each and every one of which was the subject of the aforesaid release of claims and demands.

As the Court has made clear, the release is a valid, duly executed document approved by the Court and the parties at a special hearing, and it operates as a bar against further pursuit of the claims and demands specified therein, even through a proceeding under Bankruptcy Rule 515. But were the Court to look beyond the release and consider the merits of the outrageous charges brought against Mr. Graham and his firm in the light most favorable to the debtors, it still would dismiss the charges as being frivolous, bordering on attempted fraud upon the Court.

II

A motion to reopen bankruptcy proceedings under Bankruptcy Rule 515 is addressed to the sound discretion of the trial judge, and the granting or denial of such a motion will be reversed only for abuse of that discretion. *In Re Haker*, 411 F.2d 568 (5th Cir. 1969); *Kheel v. Bethlehem Steel Co.*, 355 F.2d 187 (9th Cir. 1965). Such a motion will be granted only for cause shown, *Hull v. Powell*, 309 F.2d 3 (9th Cir. 1962), and the determination of what constitutes sufficient good cause is within the trial court's discretion. *Bartle v. Markson*, 357 F.2d 517 (2d Cir. 1966). The burden of proof in establishing good cause is on the party seeking to reopen the bankruptcy proceeding. *In Re Fair Creamery Co.*, 193 F.2d 5 (6th Cir. 1951).

Of the many obstacles to be overcome by the Shens in order to meet their burden of proof to show good cause to reopen none is more formidable than the general release signed by the Shens and approved by their legal counsel, Michael Kaye. As is obvious from a reading of those provisions set forth in Section I, *supra*, the release is a broad instrument, the purpose of which is to put to rest precisely the types of claims the

Shens are asserting as grounds for their Rule 515 motion. The release by its terms embraces "all liability, claims, demands, actions, and causes of actions, known *or unknown*, of every kind, description and nature, now existing, or hereafter arising * * *."

The Shens urge this Court to find the release invalid and unenforceable. The arguments they offer in support of such a finding are less than clear, but apparently are grounded in what they term as Mr. Graham's "double fiduciary status" at the time the release was executed. This status, Mr. and Mrs. Shen contend, results from Mr. Graham's position as ex-trustee of the Shen estate and his alleged usurpation of Mr. Kaye's role in advising the Shens on the merits of the settlement and release.

It is beyond question that bankruptcy trustees occupy a fiduciary position in releation (*sic*) to administration of bankruptcy estate assets. *In Re Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir. 1977). It is unclear, however, what fiduciary duty lingers after the trustee's resignation has been accepted by the bankruptcy court and the trustee is attempting to resolve questions of liability with ex-debtors. The Shens have offered no authority in support of their assertion that an ex-trustee operates in a fiduciary capacity in negotiating a settlement and release of liability with debtors. Resolution of this precise issue is not required by the facts of the present case though, since this Court finds that Mr. Graham's disclosures were more than adequate, whether or not he was operating as a fiduciary in negotiating the settlement and release here at issue.

"In the case of releases, as in other instances of dealing between the fiduciary and the person for whom he is acting, there must be proof of full disclosure by the trustee of the facts of the situation and the legal rights of the beneficiary * * *." Bogert, *The Law of Trusts and Trustees*, § 943. This Court finds that there was full disclosure on the part of Mr. Graham, and that the Shens were fully aware of the facts giving rise to their claims as well as their legal rights, which they have vigorously pursued throughout the course of their bankruptcy proceedings. For

example, the facts of the mail interception claims raised by the Shens were known to them well in advance of the settlement and release. On February 13, 1979, Mr. Shen stated these claims in a letter to Mr. Graham. The same claims were raised again at hearings on February 20, 1979, and March 12, 1979. Indeed, the legal theory of the mail interception claim, based in part on *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which is raised here as a ground for rescinding the release and reopening the case, was concisely laid out in January, 1979, at page four of the "Debtors' Opposition to Proposed Order Modifying the Order Authorizing Trustee to Employ Real Property Manager" filed by Mr. Kaye on behalf of Mr. and Mrs. Shen.

Similarly, the estate records claim was raised by Mr. Shen in a letter to Mr. Graham dated February 7, 1979. Mr. Kaye seconded those claims by letter of February 8, 1979, to Mr. Graham. The detailed responses of the Luce, Forward firm, stating their position on the question of turnover of records, also served to inform the Shens of the facts surrounding the records issue. The legal theory of their records claim was set forth in full in April, 1979, in the debtors' opposition to the Trustee's fee application for the period from April 25, 1978, to April 1, 1979.

Mr. Shen's testimony on July 5, 1978, during an examination pursuant to Rule 205, demonstrates that in relation to the remaining claims asserted as a basis for the motion here under consideration--the Trustee's handling of the Fifth and Fir and Cherokee Avenue properties and the B & H Music litigation--there was sufficient disclosure on Mr. Graham's part and sufficient knowledge on Mr. Shen's part to support the validity of the release of those claims. The bulk of the substance of these claims is also outlined in the Trustee's motion to determine his responsibilities and liabilities filed on August 7, 1978. Furthermore, the problems associated with the Fifth and Fir property were fully set out, including the conflict of interest problem, during the June 21, 1978, hearing on the debtors' motion to remove the real property manager. The request for additional findings proposed by Mr. Kaye, dated July 27, 1978, shows detailed

knowledge of the conflict of interest issue. This Court's conclusion as to the adequacy of disclosure is provided further equitable support by the facts that Mr. Graham's firm held the estate records open for the Shens' inspection,[4] that the Shens refused to avail themselves of this opportunity, and that the Trustee actively and promptly sought to ferret out and to resolve these liability issues.[5]

The second facet of Mr. Graham's "double fiduciary status" allegedly stems from his usurpation of the role of the Shen's lawyer, Mr. Kaye, by means of a telephone conversation with Mr. Shen on the evening prior to the April 18, 1979, hearing at which the Shens executed the settlement and release. This Court finds that whatever influence Mr. Graham may have exercised on Mr. Shen's judgment on the evening of April 17 was more than compensated for by the advice of Mr. Kaye on the morning of April 18. The memorandum of release signed by the Shens contains in paragraphs four and five an explicit acknowledgment that the release was entered into without undue influence and upon advice of their lawyer. These acknowledgments were corroborated by Judge Katz' findings of fact Nos. 4 and 6. Moreover, Mr. Kaye himself by his signature approved these documents as to form and content.

This Court concludes that the grounds offered by the Shens for invalidating the release are entirely insufficient. Thus, they have failed to overcome the primary barrier to meeting their burden of persuasion on the showing of good cause required to open the bankruptcy proceedings. In addition to the reasons already provided, refusal to reopen the bankruptcy proceedings is further compelled by a number of additional factors. First, the Shens waived their rights to have the release reconsidered, but nonetheless pursued them with this motion. Furthermore, attorney Kaye stated to the bankruptcy court that he would not appear to challenge the release which he signed, but nonetheless has so appeared. Second, Judge Katz independently found the terms of the release and settlement fair, and both Judge Katz and auditor Goldberg approved the Trustee's handling of the Shen estate. Finally, federal courts have emphasized that "it is important to litigants and the

public alike that there be effective and expeditious disposition of disputes which reach the courts, and this consideration is remarkably important in matters of bankruptcy." *California Airmotive Corp. v. Bass*, 354 F.2d 453, 455 (9th Cir. 1965). The effective and expeditious disposition of disputes such as the ones here at issue will be greatly furthered if courts honor settlements such as the one challenged by this motion. The motion to reopen the bankruptcy proceedings involving the Shens is accordingly DENIED.

III

Paragraph 7 of the release here at issue provides that the releasing parties shall pay any and all attorneys' fees incurred by the released parties resulting from any attempt to set the release aside. Thus, as a matter of contractual right, this Court awards attorneys' fees in favor of Mr. Graham and the firm of Luce, Forward, Hamilton and Scripps to be paid by Mr. and Mrs. Shen.

In addition, this Court finds Mr. Kaye jointly liable for those same attorneys' fees under the inherent power of this Court, recently reaffirmed by the United States Supreme Court in *Roadway Express, Inc. v. Piper*, 48 U.S.L.W. 4836 (June 23, 1980). Although the "American rule" is that generally a prevailing party is not entitled to recovery of attorney's fees, *Arcambel v. Wiseman*, 1 U.S. (3 Dall.) 306 (1796), federal courts retain the inherent power to tax counsel fees against a party who has willfully and in bad faith abused judicial processes. *Roadway, supra*, 48 U.S.L.W. at 4840. The instant motion to reopen is an example of such willful and bad faith abuse.

On July 5, 1978, during the course of an examination of Mr. Shen pursuant to Rule 205, Mr. Kaye made the following statement:

> "MR. KAYE: LET ME EXPRESS ON THE RECORD OUR HUGE AND UNLIMITED ADMIRATION FOR THE IRONCLAD LANGUAGE DESIGNED BY MR. BROWN IN THIS PROPOSED APPLICATION FOR STIPULATED ORDER. IT

COVERS MUCH MORE--WELL, FOR THE PURPOSE THAT MR. BROWN IS OFFERING IT, IT SIMPLY PROTECTS THE TRUSTEE. IT COVERS MUCH MORE THAN WE THINK IS NEEDED ON BEHALF OF THE TRUSTEE OR OTHER PARTIES THAT THE TRUSTEE HAS SOUGHT TO PROTECT BY THE ORDER. ONE OF THE MOST OBJECTIONABLE FEATURES OF THE PROPOSED STIPULATED ORDER APPEARS IN PARAGRAPH 3 OF THE STIPULATION ON PAGE 4 BEGINNING LINES 10 THROUGH LINE 17. WE HAVE HERE A GENERAL RELEASE AND ALSO A WAIVER OF THE PROVISIONS OF CALIFORNIA CIVIL CODE SECTION 1542. NOW, THAT PROVISION OF THE CALIFORNIA CIVIL CODE WOULD PROVIDE THAT ANY GENERAL RELIEF THAT WE MAKE WOULDN'T EXTEND TO CLAIMS WHICH WE MIGHT HAVE THAT WE'RE UNAWARE OF AT THE PRESENT TIME AND WHICH IF WE HAD BEEN AWARE OF, IT WOULD HAVE MATERIALLY AFFECTED OUR SETTLEMENT.

• • • • •

• • • AND IF WE SHOULD LATER DISCOVER A MAJOR DISCREPANCY, WE WOULD BE BARRED BY THIS WAIVER, BY THIS VERY BROAD, GENERAL RELEASE FROM EVER OBTAINING A RECOVERY ON SOMETHING--IN EFFECT WE ARE BEING ASKED TO SIGN AWAY IN THE BLIND ANY CLAIMS WHICH WE MAY HAVE.

• • • • •

MR. KAYE: WELL, THIS EXHIBIT 1 IS--COVERS EVERY CONCEIVABLE POSSIBILITY UNDER THE SUN, AND RUNS FAR BEYOND ANY PROTECTION THAT MAY BE REQUIRED BY THE TRUSTEE." R.T. 5-7.

Thus, Mr. Kaye demonstrated his awareness that the release challenged through the motion here under consideration had the legal effect of barring "every conceivable possibility under the sun." Nonetheless, he proceeded to challenge the release on the basis of a number of issues which had already been contested by both sides prior to the execution of the release.

This awareness on Mr. Kaye's part of the legal effect of the release, coupled with several other facts, leads this Court inexorably to the conclusion that the present motion to reopen was made vexatiously, unreasonably, in bad faith and was willfully abusive. First, the Shens offered almost nothing in the way of factual support of their challenge to the release which had not been brought to light prior to the settlement and release. Second, their legal arguments on the invalidity of the release were manifestly transparent in their lack of merit. Their usurpation of counsel theory was particularly vacuous. Third, as Mr. Kaye's affidavit and statements at the hearing make evident, his motivation in bringing this action was to rectify what he saw as errors of judgment, on both his and the Shens' part, in negotiating the release. It is not a legitimate ground for challenging a release and settlement that a better deal could have been, or should have been negotiated by a party or his attorney. Fourth, there was a marked chasm between the charges of crime and corruption leveled by Mr. Kaye, who injected them with a great deal of vituperative rhetoric, and the facts offered in support of those charges. Finally, this Court finds it disturbing whenever an officer of this Court seeks to repudiate a signature to a document made in open court.

In addition, pursuant to 18 U.S.C. § 1927, this Court assesses the costs of this motion against attorney Kaye. That statute provides:

> "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs."

In these days of crowded dockets and increasing caseloads, the time of federal courts is an ever more precious resource, which this Court will not tolerate having squandered in pursuit of manifestly unmeritorious motions. Such motions contribute to the glacial pace of modern litigation, which as the Supreme Court has recently emphasized, breeds frustration with the federal courts, and ultimately disrespect for the law.

In assessing the amount of attorneys' fees to be awarded as reasonable compensation for the work performed in responding to the Shens' motion to reopen, this Court has been guided by the criteria outlined in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976). In particular, the computation was based on the time and labor required to organize, review, and present the massive amount of material involved in the Shens' charges, 324 hours by the Luce, Forward firm and an additional 39.5 hours by the Seltzer, Caplan firm, and a reasonable hourly billing rate, averaging approximately $85 an hour for the Luce, Forward firm, $150 an hour for Mr. McMahon's 26.5 hours as the attorney of record, and $35-$40 an hour for 13 hours of law clerk research. Also specifically considered were the time limits imposed for organizing, reviewing, and presenting voluminous materials dealing with the Shens' estate, the high quality of the work performed by respondents' counsel, their success in defeating the motion to reopen, the experience, reputation, and ability of respondents' counsel, and the acrimonious nature of the task of dealing with the Shens and Mr. Kaye.

Accordingly, IT IS HEREBY ORDERED that the motion to reopen bankruptcy proceedings is DENIED, and that attorneys' fees in the amount of $31,883 and costs in the amount of $4,456.29 are assessed jointly and severally against Mr. and Mrs. Shen and Mr. Michael Kaye to be paid within thirty (30) days.

Dated: September 10, 1980.

William H. Orrick
United States District Judge

FOOTNOTES

1. Rule of Professional Conduct of the State Bar of California 2-110 states:

> "A member of the State Bar shall not seek or accept employment to accomplish any of the following objectives, nor shall the member do so if the members knows or should know that the person solicited for or offering the employment wishes to accomplish any of the following objectives:
>
> (A) Bring a legal action, conduct a defense, or assert a position in litigation, or otherwise take steps, solely for the purpose of harassing or maliciously injuring any person or to prosecute or defend a case solely out of spite.
>
> (B) Present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by good faith argument for an extension, modification or reversal of existing law.
>
> (C) Take or prosecute an appeal solely for delay, or for any other reason not in good faith."

2. This Court recommends pursuant to Local Rule 110-6 that the Standing Committee on Discipline review Mr. Kaye's qualifications to remain a member of the Bar of this Court.

3. On April 18, 1979, before the Honorable Herbert Katz, Mr. Kaye stated: "Mr. Shen's decision is made and I believe it will stand and I am not going to come back to unmake it." Transcript of the afternoon session, April 18, 1979, p. 10.

4. *See, e.g.*, letters dated March 8, 1979, and March 14, 1979, from the Luce, Forward firm to Mr. Kaye.

5. The Trustee filed his motion to determine the responsibility and liability issues on August 7, 1978, just weeks after the issues were raised during the Rule 205 examination.

FILED

FEB 4 1981

RICHARD H. DEANE
CLERK U.S. COURT OF APPEALS

2-1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In the Matter of SAMUEL T. H. SHEN, and CAROLYN JEAN SHEN,
Debtors.

No. 80-5784

MICHAEL KAYE,

Appellant,

vs.

LUCE, FORWARD, HAMILTON & SCRIPPS: and THEODORE W. GRAHAM,

Appellees.

BK # 74-607K
BK # 74-608

ORDER

Before: TANG and CANBY, Circuit Judges

Upon due consideration, the court enters the following order:

1. Appellant's motion for an extension of time to respond to appellee's motion to dismiss this appeal is granted, and the opposition heretofore received is ordered filed;

2. Appellees' motion to dismiss this appeal as moot is denied;

3. The certificate of record, heretofore received, is ordered filed; and

4. Appellant shall file his opening brief on or before forty (40) days from the entry of this order.

Mo Cal 1/26/81*

FILED
OCT 5 1981
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

3-1

FILED
OCT 29 1981
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

DOCKETED
Marilyn Rolls
Deputy Clerk

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

In the Matter of	
SAMUEL T. H. SHEN and CAROLYN JEAN SHEN,	Bankruptcy Nos. 74-607-K 74-608-K
Debtors.	MEMORANDUM AND ORDER

Heretofore this Court denied a motion of Mr. and Mrs. Samuel T. Shen, ex-debtors, and their attorney, Mr. Michael Kaye, to reopen bankruptcy proceedings in order to charge the trustee in bankruptcy, Mr. Theodore Graham, and his counsel, Luce, Forward, Hamilton and Scripps, with misconduct on the grounds that a duly executed, valid release acted as a bar to reopening the bankruptcy proceedings. This Court further found that the motion was "an unreasonable and vexatious multiplication of the Shen's bankruptcy proceedings," promulgated by bad-faith motives and thereupon imposed joint and several liability upon Mr. Kaye and the Shens for costs and attorney's fees in the amount of $36,339.29. Mr. Kaye, *in propria persona*, appealed this Court's judgment to the Ninth Circuit Court of Appeals. The Shens and appellees, Mr. Graham and Luce, Forward, Hamilton and Scripps, entered into a settlement of this Court's judgment on September 16, 1980, with full satisfaction of the judgment taking place on November 11,

1980. Appellees' motion to dismiss the appeal as moot was denied by the Court of Appeals. Appellees now move to require appellant to file a cost bond of $15,000 pursuant to Rule 7 of the Federal Rules of Appellate Procedure. Initially appellees requested a cost bond of $25,000, including $20,000 for anticipated attorney's fees and $5,000 for costs. Later appellees amended the figure downward to $15,000, giving no breakdown as to what portion of the bond would cover attorney's fees and what portion would cover costs.

Rule 7 provides:

> "The district court may require an appellant to file a bond or provide other security in such form and amount as it finds necessary to ensure payment of costs on appeal in a civil case."

Prior to the 1979 Amendment, Rule 7 required the filing of a $250 bond, allowing the court to increase the amount upon a proper motion by appellee. The 1979 Amendment, as reflected by the *Advisory Committee Note*, dispensed with the requirement of a $250 bond, leaving the imposition of an appeal bond to the discretion of the district court. The decision to delete the $250 filing requirement was made upon the presumption that "[t]oday it bears no relationship to actual costs." *Advisory Committee Note*, 1979 Amendment to Rule 7. Nowhere in the prior rules, the amended Rule 7 or in any of the case law is mention made of including attorney's fees as part of the costs contemplated by Rule 7. Rather, Rule 7 applies only to those routine taxable costs authorized by 28 U.S.C. § 1920 and Rule 39 of the Federal Rules of Appellate Procedure. 9 *Moore's Federal Practice* par. 207.06 at 7-10.

Therefore, the costs of appeal contemplated by Rule 7 are: the docket fee, 28 U.S.C. § 1921; costs of briefs, appendices, and copies of records, Rule 39(c); and preparation and transmission of the record and the cost of the reporter's transcript if necessary, Rule 39(e). Appellees originally stated that a reasonable dollar figure for their costs, as enumerated above, is $5,000. Therefore,

IT IS HEREBY ORDERED that appellees' motion to require appellant, Michael Kaye, to file a cost bond to ensure payment of costs on appeal is GRANTED; provided, however, the amount of the cost bond shall be $5,000 instead of $15,000.

Dated: October 5, 1981.

William H. Orrick
United States District Judge

FILED

JAN 18 1982

CLERK, U.S. COURT OF APPEALS

4-1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN THE MATTER OF
SAMUEL T.H. SHEN and
CAROLYN JEAN SHEN,

Debtors.

MICHAEL KAYE,

Appellant,

v.

LUCE, FORWARD, HAMILTON & SCRIPPS; AND THEODORE W. GRAHAM,

Appellees.

No. 80-5784

Bankruptcy Nos. 74-607-K
74-608-K

ORDER

Appeal from the United States District Court
for the Southern District of California

William H. Orrick, District Judge, Presiding

Argued and Submitted January 5, 1982

Before: CHOY, GOODWIN, and FARRIS, Circuit Judges

The appeal is dismissed for the refusal of Appellant Michael Kaye to post the cost bond fixed by the district court pursuant to Rule 7, Fed. R. App. P., by order filed October 5, 1981, and for the failure of the Appellant to file within a reasonable time thereafter a motion for relief or

for reduction of the amount of the bond by showing his inability to comply with the court's order.

The panel of this court before which this appeal was set for hearing on January 5, 1982, is advised that Appellant filed a motion regarding this matter in the Clerk's Office in San Francisco on January 4, 1982. When the panel receives copies of that motion, it will consider it, and if it decides to amend this order, it will do so within seven (7) days from the date this order is filed.

FILED

FEB 24 1982

CLERK, U.S. COURT OF APPEALS

5-1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN THE MATTER OF
SAMUEL T.H. SHEN and
CAROLYN JEAN SHEN,

Debtors.

MICHAEL KAYE,

Appellant,

v.

LUCE, FORWARD, HAMILTON & SCRIPPS: AND THEODORE W. GRAHAM,

Appellees.

No. 80-5784

Bankruptcy Nos. 74-607-K
74-608-K

ORDER

Before: CHOY, GOODWIN and FARRIS, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. The petition for rehearing is denied.

No. 81-2212

Office - Supreme Court, U.S.
FILED
JUN 28 1982
ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

October Term, 1981

MICHAEL KAYE,
Petitioner,

v.

LUCE, FORWARD, HAMILTON & SCRIPPS;
and THEODORE W. GRAHAM,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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June 24, 1982

INTERNATIONAL PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 276-2080

QUESTIONS PRESENTED

1. Whether the Court of Appeals gravely departed from the accepted and usual course of judicial proceedings when, after conducting a hearing and receiving petitioner's written submissions, it exercised its discretion to dismiss the appeal of petitioner, a licensed attorney appearing on his own behalf, for failure to post a cost bond ordered by the District Court after motion and full opposition.

2. If the first question is answered affirmatively, whether this Court should consider issues of the merits of the case which were not considered below and, if so,

a. whether the entire matter is moot because petitioner has no liability under the District Court's judgment;

b. whether under all the circumstances petitioner had adequate notice below that respondents were seeking an award of sanctions against him;

c. whether petitioner received a fair hearing under *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), before the imposition of sanctions.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
A. Proceedings Below	1
B. Nature Of The Underlying Dispute	6
SUMMARY OF ARGUMENT	13
THE PETITION FOR CERTIORARI SHOULD BE DENIED	14
A. The Court Of Appeals Did Not Abuse Its Discretion When It Dismissed Petitioner's Appeal For Failure To Post A Cost Bond After Petitioner Repeatedly Failed To Observe Rules And Court Orders	14
B. This Court Should Not Consider Issues Which Formed No Part Of The Disposition Below	17
C. Granting Certiorari Would Only Waste Resources On Petitioner's Moot, Hollow And Meritless Contentions	18
1. Michael Kaye's Appeal Was Moot	18
2. Michael Kaye Received Fair Notice Of The Request For A Fee Award	19
3. Michael Kaye Had No Right To A Trial-Type Hearing	21
4. Michael Kaye Had No Right To Jury Trial	23
CONCLUSION	25

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Carder, 150 P.2d 754 (Kan. 1944) 19

Barker v. Bledsoe, 85 F.R.D. 545 (W.D. Okla. 1979).... 23

Braziller v. Lind, 32 F.R.D. 367 (S.D.N.Y. 1963) 23

California Bankers Assn. v. Shultz, 416 U.S. 21 (1974).. 19

Carr v. Grace, 516 F.2d 502 (5th Cir. 1975)..... 16

Duncan v. Louisiana, 391 U.S. 145 (1968), *reh. denied* 392 U.S. 947 (1968) 24

Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968) 24

Farmer v. Arabian American Oil Co., 285 F.2d 720 (2d Cir. 1960) 16

Glass v. Pfeffer, 657 F.2d 252 (10th Cir. 1981) 18

Hargraves v. Bowden, 217 F.2d 839 (9th Cir. 1954)..... 16

Hayden Stone, Inc. v. Brode, 508 F.2d 895 (7th Cir. 1974)..... 22

Leader Clothing Co. v. Fidelity & Casualty Co. of New York, 227 F.2d 574 (10th Cir. 1955) 19

Little v. Bowers, 134 U.S. 547 (1890)..... 19

Margoles v. Johns, 587 F.2d 885 (7th cir. 1978) 22

National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976) *reh. denied sub. nom* United States v. Janis, 429 U.S. 874 (1976)..... 22

NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)... 17

TABLE OF AUTHORITIES (Continued)

Page

CASES (Continued)

Persson v. Faestel Investments, Inc., 88 F.R.D. 668 (N.D. Ill. 1980) 22,23

Pfister v. Delta Air Lines, 496 F.Supp. 932 (N.D. Ga. 1980) 25

Powers v. Citizens Union National Bank & Trust Co., 329 F.2d 507 (6th Cir. 1964) 16

Reed v. Jones & Laughlin Steel Corp., 606 F.2d 233 (8th Cir. 1979) 15

Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980) ... i,4,14,17, 18,20,21, 22,23,24,25

Rothman v. Hospital Service of Southern California, 510 F.2d 956 (9th Cir. 1975) 21,23

Sager v. Moy, 9 Atl. 847 (R.I. 1887) 19

Settler v. Yakima Tribal Court, 419 F.2d 486 (9th Cir. 1969), *cert. denied* 398 U.S. 903 (1970) 16

Shapiro v. Freeman, 38 F.R.D. 308 (S.D.N.Y. 1965) 23

Smoot v. Fox, 353 F.2d 830 (6th Cir. 1965), *cert. denied sub nom.* League of Women Voters v. Smoot, 384 U.S. 909, *reh. denied* 384 U.S. 958 (1966) ... 24,25

Societe Internationale Pour Participations Industrielles, etc. v. Rogers, 357 U.S. 197 (1958) 22

Szilvassy v. United States, 71 F.R.D. 589 (S.D.N.Y. 1976) 23

TABLE OF AUTHORITIES (Continued)

Page

CASES (Continued)

Textor v. Board of Regents of Northern Illinois University, 87 F.R.D. 751 (N.D. Ill. 1980) 25

United States v. United Mine Workers, 330 U.S. 258 (1947) 24

Westinghouse Credit Corp. v. Bader & Dufty, 627 F.2d 221 (10th Cir. 1980) 15

Westinghouse Electric Corp. v. Weigel, 426 F.2d 1356 (9th Cir. 1970) 21,23

White v. New Hampshire Dept. of Employment Security, 102 S.Ct. 1162 (1982) 18

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS

Judicial Code
28 U.S.C. § 1927 15,18,23,25

Rules of the Supreme Court of the United States
Rule 17 25

Federal Rules of Appellate Procedure
Rule 3(a) 16
Rule 7 14,15

Federal Rules of Civil Procedure
Rule 37 22

SECONDARY AUTHORITIES

Note, *Nemeroff v. Abelson, Bad Faith, And Awards of Attorneys' Fees*, 128 U. Pa. L. Rev. 468 (1979) .. 24

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner, an attorney appearing on his own behalf, invites this Court's attention to the self-caused procedural dismissal of his moot appeal from the consequences of his bad faith conduct in the District Court. If the Petition accurately stated the proceedings below, this case would not be made of the fiber from which decisions of this Court may be woven. Neither departures from the accepted and usual course of proceedings nor important questions of federal law reside in the record. Accurate description of the proceedings below reveals beyond argument that the Ninth Circuit's resolution of this case was correct and unremarkable from this Court's perspective.

Petitioner Michael Kaye was the seventh in a string of attorneys who represented Samuel T.H. Shen and Carolyn Jean Shen in the course of protracted proceedings in the Bankruptcy Court, Southern District of California. 6 *Excerpt of Record* 1863 (hereafter "Excerpt"). Appearing late in the proceeding, he has directed a vendetta against respondents and the San Diego federal bench ever after. These appellate proceedings result from the District Court's finding that Michael Kaye conducted the vendetta in bad faith.

The Shens first sought Chapter XII relief March 20, 1974. 6 *Excerpt* 1863. They were adjudicated bankrupts October 30, 1975. 6 *Excerpt* 1904. The Shens then filed a Chapter XI proceeding June 4, 1976, (6 *Excerpt* 1913) but were promptly adjudicated again on July 8, 1976. 6 *Excerpt* 1917. The Shens re-converted the proceeding to Chapter XII on November 21, 1977, and that status continued until dismissal. 6 *Excerpt* 1932.

The Shens voluntarily dismissed their proceeding on December 20, 1979. 2 *Excerpt* 267-279.

Respondent Theodore W. Graham was appointed full operating trustee on the day after the Shens filed the first Chapter XII petition. 6 *Excerpt* 1863. His authority was continued through the various mutations of the proceeding until his resignation. 6 *Excerpt* 1904, 1905, 1917, 1918, 1932. Respondent Luce, Forward, Hamilton & Scripps was duly appointed as Mr. Graham's counsel in the various mutations of the proceeding, although Mr. Graham did have other counsel for some purposes. 6 *Excerpt* 1870, 1906, 1933. Mr. Graham is a partner of Luce, Forward, Hamilton & Scripps.

Mr. Graham tendered his resignation as trustee in open court October 31, 1978. 6 *Excerpt* 1961. His resignation was accepted by written order November 9, 1978. 6 *Excerpt* 1962. His final discharge was entered May 18, 1979. 2 *Excerpt* 281-282.

Michael Kaye first became counsel of record for the Shens January 15, 1979 (6 *Excerpt* 1965), although he had been involved in the case for a few preceding months as an associate of one of the Shens' prior attorneys.

On April 18, 1980, Michael Kaye, on behalf of the Shens, filed in the District Court a motion to reopen the dismissed Chapter XII proceeding. 1 *Excerpt* 1. The sole purpose of the motion was to seek certain relief against respondents. There were twelve parts to the motion, seeking relief as follows:

1. reopening the proceeding
2. disqualifying Bankruptcy Judge Herbert Katz
3. compelling respondents to turn over certain records
4. inventory of allegedly intercepted mail
5. leave to bring a plenary action against respondents for invasion of privacy
6. disgorging all trustee's and attorneys' fees

7. surcharge relating to alleged losses involving certain real property

8. surcharge relating to alleged mishandling of certain litigation

9. surcharge in the amount of a $5,968.03 promissory note

10. revoking Mr. Graham's discharge

11. invalidating a general release and revoking a stipulated order terminating all disputes between respondents and the Shens

12. discipline against Mr. Graham and one of his law partners

Respondents filed their opposition to the motion to reopen on May 12, 1980. 1 *Excerpt* 129. In their responding papers respondents demanded an award of costs and attorneys' fees against the Shens and Michael Kaye. 1 *Excerpt* 159-166. Respondents also pointed out that none of the relief sought in the Shens' motion, except the reopening itself, was properly requested from the District Court in the form of the motion. 1 *Excerpt* 156-159. The Shens agreed with respondents' procedural position in a supplemental memorandum. 1 *Excerpt* 222.

The motion to reopen was first heard by District Judge Howard B. Turrentine on May 19, 1980. 6 *Excerpt* 1977. Angered by Michael Kaye's insinuations about the integrity of his chambers, Judge Turrentine disqualified himself after hearing only Michael Kaye's argument. *Transcript of Hearing* before Honorable Howard B. Turrentine, May 9, 1980, at 18-22. Chief Judge Schwartz transferred the case to District Judge Leland C. Nielsen. 6 *Excerpt* 1977.

Samuel Shen filed an affidavit to disqualify Judge Neilsen and Michael Kaye filed a certificate of good faith supporting the disqualification. 6 *Excerpt* 1718-1723. On May 27, 1980 Judge Nielsen conducted a brief hearing in which he announced that the stated bases for disqualification were untrue but recognized that he had no power to conduct an evidentiary hearing. Accordingly, he recused himself and sent the matter back to Chief Judge Schwartz. *Transcript of Hearing* before Honorable

Leland C. Nielsen, May 27, 1980, at 16. Judge Schwartz ordered that a visiting judge be assigned to hear the matter. *Transcript of Hearing* before Honorable Edward J. Schwartz, May 27, 1980, at 12.

Chief Judge Browning of the Ninth Circuit assigned District Judge William H. Orrick of the Northern District of California to hear the matter. 6 *Excerpt* 1741.

Judge Orrick conducted a hearing on July 7, 1980 and took the matter under submission. 6 *Excerpt* 1979. Both sides filed supplemental papers, respondents' limited to newly discovered evidence and Michael Kaye's of broad scope. *Id.* Judge Orrick issued his opinion September 16, 1980, and notice was given to all parties and counsel the next day. 6 *Excerpt* 1979 (docket), 6 *Excerpt* 1844 (opinion).

Judge Orrick denied the motion to reopen. Basing his decision on *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), he also granted $4,456.29 costs and $31,883.00 attorneys' fees to respondents and against the Shens and Michael Kaye, jointly and severally. 6 *Excerpt* 1858. Judgment was entered. 6 *Excerpt* 1861-1862. Appeal followed. 6 *Excerpt* 1860.

The Shens and respondents reached a compromise of the Shens' liability, and a full satisfaction of the judgment was filed. 6 *Excerpt* 1981; the Agreement is Exhibit C to appellees' Motion to Dismiss the appeal filed in the Court of Appeals November 26, 1980, and the satisfaction is Exhibit D to the same motion. Michael Kaye has no liability on the judgment, and the Shens further released him from any claims for indemnity or contribution. Exhibit C to Motion to Dismiss at page 9. Respondents moved to dismiss Michael Kaye's appeal as moot, and the motion was denied. *Order* of February 4, 1981.

On February 19, 1981 respondents filed a motion in the District Court to require Michael Kaye to post a cost bond of $25,000.00. Principally respondents sought security for attorneys' fees on appeal. Petitioner filed a 13-page memorandum in opposition and a 6-page declaration. Because

of calendar problems the motion was not heard, although Michael Kaye specifically waived oral argument. Declaration of Michael Kaye In Opposition, etc., at 4:24-26.

In July of 1981 respondents amended and renewed their motion to require a cost bond. The principal amendment was to reduce the amount requested to cover attorneys' fees, based on the actual cost of preparing their brief. Michael Kaye filed further opposition and a further declaration; again he agreed to waive oral argument.

Never before the District Court's decision on the motion did Michael Kaye submit any evidence regarding his ability to obtain a cost bond in the amount requested or in any other amount. He admitted that he could not qualify to proceed *in forma pauperis* and stated only that he lacked $25,000.00 in assets.

On October 5, 1981 the District Court issued its Memorandum and Order calling for Michael Kaye to post a cost bond of $5,000.00. The District Court specifically refused to require any security for attorneys' fees which might be awarded as costs on appeal.

Despite demand, Michael Kaye did not post the bond. He sought no reconsideration or other relief in the District Court. He sought no relief in the Court of Appeal.

At the same time, Michael Kaye was otherwise abusing the administration of justice. He missed filing deadlines, seeking post-expiration relief from the Court of Appeal. He finally filed a brief nearly thirty pages overlength and two weeks after his final deadline. The Court of Appeal rejected that brief. Michael Kaye then filed another brief, seeking an affirmative judgment for money against respondents for matters not tendered to the District Court.

On December 23, 1981 respondents served upon petitioner a motion to dismiss the appeal for failure to file the cost bond.

Michael Kaye served his opposition to the motion to dismiss and served a motion to reduce the cost bond on respondents on December 31, 1981. Although both parties knew that oral argument was scheduled in Los Angeles on January 5, 1982, Michael Kaye simply deposited his opposition and new motion in the mail to the San Francisco office of the Court of Appeals. He made no effort to file a copy of his papers in Los Angeles or with the panel members, whose names had been published.

Michael Kaye distorts the proceedings before the Court of Appeal on January 5, 1982. When the Ninth Circuit panel commenced its calendar, it inquired of Michael Kaye whether he had posted the bond or filed opposition to the motion to dismiss. Kaye explained that he had not posted the bond. He said he had filed both opposition to the motion to dismiss and his own motion to reduce the bond, but he did not have a copy with him in court. The panel heard argument -- all from Michael Kaye -- for at least fifteen minutes on the motion to dismiss and the motion to reduce. The panel ruled that the appeal would be dismissed. However, the panel also announced that it would review petitioner's written arguments and delcaration and amend or revoke its dismissal order if appropriate.

Michael Kaye petitioned for rehearing, and the Court of Appeals denied the petition. Reference is made in the Petition to this Court that respondents sought no cost judgment; a complete record would show that respondents refrained from filing a cost memorandum as part of a settlement proposal to which Michael Kaye never responded. The reference is hardly fair.

B. Nature Of The Underlying Dispute

Theodore W. Graham shouldered in 1974 the delicate and trouble-plagued task of salvaging for creditors some value from the disarrayed assets of Samuel T.H. Shen and Carolyn Jean Shen. In early 1978, the bankruptcy judge reported that the creditors had been paid because of "the near miraculous business and legal acumen of Theodore Graham, the Trustee. . . ." 1 *Excerpt* 177. The estate was not only solvent, but the

Shens had become millionaires. In July 1978, Judge Katz found in ruling on a fee application:

> Suffice it to say that at the commencement of these proceedings the debtors were insolvent in every sense of the word. Today, some four years later, all unsecured creditors have been paid in full with interest, the so called "equity-claimant" class of creditors has been satisfied, the secured creditor problems are basically resolved, and the debtors have an estate, net to them, approximating over $1 million.
>
> It cannot be gainsaid that the inflationary real estate market in Southern California was at least in part responsible for this success. However, it is also due in large measure to the efforts of Mr. Graham who undertook to resolve many of the problems facing the debtors and, in my opinion did so with a view in mind of serving the interests of his constituency, namely the creditors, while at the same time protecting the debtors. He did this in the face of numerous changes of counsel for the debtors as well as the oft evident contrariness of Mr. Shen. 2 *Excerpt* 515.

His job done, Mr. Graham resigned on October 31, 1978, and the Shens became debtors in possession. Beginning somewhat before his resignation and continuing thereafter, the efforts of Mr. Graham and his firm to obtain reasonable fees allowed under the Bankruptcy Act provoked adversarial responses from the Shens. Michael Kaye led the Shens' opposition, first as an associate of Attorney Wasserman and then on his own.

After several skirmishes, the parties signed a comprehensive settlement agreement, and a stipulated order was entered by the Bankruptcy Court. 2 *Excerpt* 239-249.

Michael Kaye approved and agreed to the stipulated order as to form *and* content; his signature identifies him as the Shens' attorney, but it appears in the form of a principal to the stipulation. 2 *Excerpt* 245.

Although the order is called stipulated, it was reached in open court during a contested hearing, the bankruptcy judge independently determined that it was fair in substance and fairly reached, and the court exercised its independent judgment to approve it. 3 *Excerpt* 608, 702, 716-717; 2 *Excerpt* 241-242. All terms of the agreement were discussed in full with the bankruptcy judge. 3 *Excerpt* 710, 716-717, 724, 728-731.

A year later Michael Kaye acknowledged when he moved to reopen the proceedings that all relief sought was barred if the release was valid. 1 *Excerpt* 49. On behalf of the Shens he alleged that the release was procured by "threats and cajolery" and that the Shens did not know the nature of the purported claims covered by the release.

The record abounds with evidence of Michael Kaye's bad faith, and it falls into three categories: proceeding against respondents upon claims which plainly lacked merit;[1] vexatiously overpleading and multiplying the proceedings by flagrantly improper tactics; and direct demonstration of ill motive.

Knowing his clients' rights turned upon the validity of the release, Michael Kaye attacked an agreement which he had approved in content, certified as to enforceability and promised not to attack. During the 1979 Bankruptcy Court hearing relating to the release, Michael Kaye said of the alleged "threats and cajolery:"

> Mr. Shen's decision is made *and I believe it will stand*, and I am not going to come back to unmake it. To the extent that it was made through Mr. Graham's influence

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[1] Size constraints prohibit detailing the spuriousness of the charges made against respondents. After reviewing the facts the District Court found the charges to be frivolous even if the release had never been made.

> behind my back, I do protest against it. 3 *Excerpt* 714 (emphasis added).

After some concern was expressed regarding the reliability of Mr. Shen's and Michael Kaye's statements, Kaye said:

> I have stated in court today that I will not try to undo, and I will never come back to this court to undo the statements which Mr. Shen has made today in his settlement offer, if that's what is an appropriate characterization for it. If he is going to come back and undo it, it will be done by someone else other than me. 3 *Excerpt* 717.

After making that statement petitioner approved in form and content, among other things, the following findings of fact: that the release was made by free will and without undue influence, that the release was fair, and that the release was made after receiving advice of competent counsel.

Michael Kaye attacked the release and order with a declaration by Mr. Shen which, given Mr. Shen's testimony in the 1979 hearing, was either perjurious or conclusive evidence that Mr. Shen perjured himself in 1979. Michael Kaye attacked the release despite having eloquently extolled the conclusiveness and scope of a similar document when settlement had been discussed in July of 1978. 3 *Excerpt* 979-981 (quoted by Judge Orrick).

The specific underlying charges made against respondents were frivolous and vexatious in the extreme. For example, despite knowing, as early as September of 1979, that no payments had been made on a $5,968.03 promissory note to the trustee (6 *Excerpt* 1771, 1777), and despite declining the pre-settlement invitation to review the property file relating to the note, Michael Kaye unequivocally claimed in the 1980 motion to reopen that Mr. Graham had "appropriated unto himself all proceeds paid on the note." 1 *Excerpt* 47. He persisted in these allegations despite knowing that Mr. Shen was paid (through closing of a sale

of property which was security for the note) every cent due to him from the date of making the note. 1 *Excerpt* 1808-1809.

Michael Kaye's tactics were vexatious. He drove one federal judge from the bench by demanding that the judge erect a "Chinese Wall" between himself and a law clerk. *Transcript of Hearing* before Honorable Howard B. Turrentine, May 19, 1980, at 20. He was apparently unsatisfied with the judge's assurances that he could manage his chambers to exclude the law clerk from a case involving the clerk's future employer.

Michael Kaye forced the disqualification of a second federal judge by allowing his client to file, and certifying to the good faith of (6 *Excerpt* 1722-1723), an affidavit stating falsely on information and belief that the judge had a financial interest in Luce, Forward, Hamilton & Scripps and that he achieved his judgeship through the influence of one of its partners. 6 *Excerpt* 1719; *see* 6 *Excerpt* 1731, 1729-1740 and *Transcript of Hearing* before Honorable Leland C. Nielsen, May 27, 1980, at 16. Petitioner then carefully and succinctly pointed out that even if the alleged facts were absolutely false and were offered only on information and belief, the court could not question them or conduct an evidentiary hearing. 6 *Excerpt* 1725.

Vexatiousness includes the gratuitous and ridiculous charges against Bankruptcy Judge Katz and the general theme of petitioner's entire case that the federal judiciary and respondents comprise a conspiracy to do in him and the Shens. *See* 6 *Excerpt* 1778-1779. This conspiracy came to include Judge Orrick. At.Br.22:16-19.

Michael Kaye has also vexed respondents and the courts by malicious overpleading of his cause. In the District Court he repeatedly demanded criminal prosecution of respondents (1 *Excerpt* 20, 23, 26, 28, 48, 49, 56, 57; 6 *Excerpt* 1815, 1816) and the initiation of disciplinary proceedings. 1 *Excerpt* 20, 56, 57. Such relief was not appropriate in a civil proceeding

between the Shens and respondents, and the only reason for demanding it was to annoy and harass.

Finally, Michael Kaye's motives for prosecution of the motion to reopen were hate and anger, not the protection of his clients. Before the Chapter XII was dismissed, petitioner wrote a letter to the attorney for a remaining secured creditor laying out his "time bomb" strategy for dealing with the secured creditor. 6 *Excerpt* 1771-1782, "time bomb" on 1779. Essentially Kaye threatened that if the secured creditor did not make a compromise he would expand the controversy to include respondents, delay and protract the proceedings, seek to disqualify local judges and prevent the creditor from recovering anything until after a Ninth Circuit appeal. Michael Kaye's *expressed* motive for prosecuting the motion to reopen was to hinder and delay a third-party creditor. Apparently he deceived his clients into believing that the tactic was necessary or worthwhile. *See* 1 *Excerpt* 208-209.

The *real* motive for prosecuting the motion was hatred and anger. The record oozes these resentments. Mr. Graham was a "vulture." 3 *Excerpt* 1065 (July 15, 1978). Mr. Graham "plundered," "gouged" and "bled" the Shens' estate. 3 *Excerpt* 810 (February 20, 1979). The second time Michael Kaye made those statements at the February 20 hearing, the judge cautioned him about their excessiveness; Kaye merely expanded them. 3 *Excerpt* 816-818. He claimed that the Shens were "terrified of Mr. Graham and of his exploitation of the estate." 3 *Excerpt* 816.

> We can go out on F Street right now and find any number of derelicts on the street who are every bit as competent as Mr. Graham. . . . 3 *Excerpt* 831.

He suggested that Mr. Graham's purposes in administering the Shen estate were "to preserve and perpetuate the trough at which his firm was richly feasting" and "to salvage his own sinecure." 2 *Excerpt* 287 (April 13, 1979). He accused Mr. Graham of "extortion," "boondoggling" and "blackjacking" the Shens. 2 *Excerpt* 290, 294.

> The best that could be said about the trustee and his counsel in this matter is that they were hopelessly inept. (2 *Excerpt* 293)
>
> . . . .
>
> Procrastination and featherbedding by the trustee already threaten to make these proceedings a case study in fiduciary maladministration. 2 *Excerpt* 492 (August 3, 1978)

He made unsupported allegations of felony mail theft, fee fixing and profiteering. 3 *Excerpt* 672, 673, 695.

After the release was approved by Judge Katz on April 19, Mr. Shen asked the Court:

> Your honor, will you please be nice to my attorney, Mr. Michael Kaye. He is very mad, but – 3 *Excerpt* 730.

Michael Kaye's motivation of hatred and anger rings out in stunning judicial admissions made in his rejected overlength brief reproduced below (without citations) and attached as Exhibit A to respondents' brief in the Court of Appeals.

> Mr. Shen "surrendered" in disregard of the misgivings and objections of his own counsel. Appellant was angry. He was angry at Graham's circumvention and usurpation of his own role as advisor to the Shens. He was angry that Judge Katz had refused to step out of the case even though he was himself a party litigant aligned adversely to the Shens and had used Graham as his own advocate in presenting a $95,726.25 fee claim against the Shen estate.
>
> Appellant was angry at the inquisition in which Judge Katz had cooperated fully with Graham in wrenching appellant from the counsel table, stripping away his role as advocate and converting him needlessly into a witness.

> Appellant was angry at himself for failing to give the Shens more effective reassurance. He was angry at Mr. Shen for capitulating. He was angry at the sudden collapse of the case. Out of pique and bitterness and despair, appellant stated twice on the record that he would not come back to the bankruptcy court to undo what his client had done without his approval.

SUMMARY OF ARGUMENT

1. The Court of Appeals had good reason to dismiss petitioner's appeal for failure to file a cost bond. The decision of the Court of Appeals rests solely upon discretionary procedural grounds the review of which would be a complete waste of this Court's time. Petitioner's contentions are vague, but he must contend either (1) that the District Court abused its discretion on the facts in requiring a cost bond, or (2) that the District Court committed legal error in attempting to usurp the jurisdiction of the Ninth Circuit and the Court of Appeals abused its discretion on the facts in dismissing the appeal. The former contention is unworthy of this Court's attention, and immaterial because a discretionary act of the Court of Appeals was required for dismissal. The latter contention finds no support in the actions of the District Court; it is absurd in that the Ninth Circuit received, approved of and acted upon the District Court's order after hearing the same arguments from petitioner.

2. Most of the Petition is devoted to arguments on the merits which were not considered below. Nothing in the record suggests that this Court should depart from the established practice of refusing to consider matters which are not embraced in the lower court's decision.

3. The grant of certiorari for any reason would impose an absurd waste of judicial resources. Petitioner has been released by all parties from liability arising from the proceedings below. Therefore the entire matter is moot. The specific arguments on the "merits" mentioned in the

Petition either lack factual support in the record or fail to raise a significant issue of interpretation of this Court's recent decision in *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), particularly in light of amendments to 28 U.S.C. § 1927 adopting the principles of *Roadway Express*.

THE PETITION FOR CERTIORARI SHOULD BE DENIED

A. The Court Of Appeals Did Not Abuse Its Discretion When It Dismissed Petitioner's Appeal For Failure To Post A Cost Bond After Petitioner Repeatedly Failed To Observe Rules And Court Orders.

Michael Kaye's appeal was dismissed on procedural grounds, and no others. His cavalier attitude toward compliance with federal procedure caused the dismissal. Petitioner now complains stridently of the District Court's original order requiring him to post a cost bond, saying little of the Court of Appeals' review of and action upon that order. His contentions regarding the cost bond -- on which he must prevail before any other matter can be considered -- lack clarity. If he is contending that the District Court abused its discretion on the facts in requiring a bond (and the Court of Appeal erred in approving that exercise of discretion) this case plainly does not merit the Supreme Court's attention. If he is contending that the District Court committed legal error in requiring the bond for the purpose of usurping the Ninth Circuit's jurisdiction, he faces two insurmountable hurdles. First, no such improper purpose appears in the District Court's order. Second, the Court of Appeals, which is perfectly capable of protecting its own jurisdiction, reviewed the same arguments by Michael Kaye and exercised its discretion to dismiss his appeal. In either event, Michael Kaye complains of a discretionary ruling of a lower court which should not attract the Supreme Court's attention.

Rule 7 of the Federal Rules of Appellate Procedure now vests in district courts the discretion to require an appellant to provide security for costs and to set the nature and amount of the security:

> The district court may require an appellant to file a bond or provide other security in such form and amount as it finds necessary to ensure payment of costs on appeal in a civil case.

Former Rule 7 required a $250.00 bond in every case. The Advisory Committee report proposing the change stated:

> The amendment would eliminate the provision of the present rule that requires the appellant to file a $250.00 bond for costs on appeal at the time of filing his notice of appeal. The $250.00 provision was carried forward in F.R.App.P. from former Rule 73(c) of the F.R.Civ.P., and the $250.00 figure has remained unchanged since the adoption of that rule in 1937. *Today it bears no relationship to actual costs.* The amended rule would leave the question of the need for a bond for costs and its amount in the discretion of the court. (Emphasis added)

A $5,000.00 cost bond is hardly out of line. *Westinghouse Credit Corp. v. Bader & Dufty*, 627 F.2d 221, 224 (10th Cir. 1980). This case involves a massive record of over 2,000 pages, multiple motions in the Court of Appeals, briefing, an early-promised effort to take the matter to the highest court in the land and a probable award of excess costs under 28 U.S.C. § 1927 if the matter had been heard on the merits.

Michael Kaye filed multiple sets of arguments and declarations in opposition to respondents' motion for a cost bond. Weighing the evidence and applying the law, the District Court found neither petitioner nor respondents to be entirely correct. The $5,000 bond was significantly less than respondents requested, but the amount of the bond is left to the trial court's discretion. *Reed v. Jones & Laughlin Steel Corp.*, 606 F.2d 233 (8th Cir. 1979). The District Court did not in any manner consider whether Michael Kaye's appeal was frivolous or meritorious. It refused to provide security for prospective attorneys' fees. When the District Court made its order, petitioner had submitted not a

scintilla of evidence in his lengthy papers that he might not be able to afford a $5,000.00 bond.

Respondents sought dismissal of Michael Kaye's appeal not only for simple failure to file a cost bond, but for his repeated failure to respect normal procedure. Petitioner failed to seek any review in any court of the cost bond order. He repeatedly missed deadlines. He filed a defective and significantly tardy brief. He attempted to obtain relief in the Ninth Circuit which was not sought below. Considering the consistent nose-thumbing at the orderly administration of justice, the Ninth Circuit had good reason to dismiss the appeal. *Powers v. Citizens Union National Bank & Trust Co.*, 329 F.2d 507, 508-09 (6th cir. 1964); *Hargraves v. Bowden*, 217 F.2d 839, 840 (9th Cir. 1954).[2] See F.R.A.P. Rule 3(a):

> Failure of an appellant to take any step other than timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the Court of Appeals deems appropriate, which may include dismissal of the appeal.

Petitioner argued to the Ninth Circuit panel at length regarding the cost bond. He submitted thick papers opposing dismissal and seeking a reduction of the bond. The Court of Appeals clearly approved the District Court's exercise of discretion. If the Court of Appeal believed its appellate jurisdiction was being usurped, as Michael Kaye suggests, it certainly could have protected that jurisdiction by its own order. The Court of Appeals exercised its own discretion to dismiss the appeal. The accepted and usual course of the administration of justice needs no assistance from this Court in this case.

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[2] Even in this Court, petitioner's authorities are not in point. *Settler v. Yakima Tribal Court*, 419 F.2d 486, 487 n. 2 (9th Cir. 1969), *cert. denied* 398 U.S. 903 (1970) involved a supersedeas bond, and the appellant corrected the problem before the court's ruling. In *Carr v. Grace*, 516 F.2d 502, 504 (5th Cir. 1975) by the time the dismissal was requested the court had found the appeal meritorious and reversed; therefore there was nothing to be bonded. *Farmer v. Arabian American Oil Co.*, 285 F.2d 720 (2d Cir. 1960) involves a trial court cost bond, not an appeal bond.

B. This Court Should Not Consider Issues Which Formed No Part Of The Disposition Below.

The United States Supreme Court normally declines to consider claims which form no part of the decision below. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 163-64 (1975). The Ninth Circuit dismissed Michael Kaye's appeal because of the cost bond matter without reaching any issue on the merits. Thus the great bulk of the Petition relates to issues unripe for decision.

This case hardly rises to the level of the landmark decisions in which this Court has reached out to grapple with issues of great national importance irrespective of how they were handled in lower courts. If one were to consider the merits, the case is at most a factual analysis of whether the precise elements of the notice and hearing afforded Michael Kaye gave him everything to which he was entitled. The right to notice and hearing was resolved in *Roadway Express*.

The issues petitioner attempts to raise are completely independent from the procedural basis of the dismissal. None of petitioner's issues needs to be addressed in considering whether the dismissal of the appeal was proper.

Consideration of the underlying issues in this case would be premature from both a narrow perspective and a broad policy view. Viewing the case narrowly, the Ninth Circuit has never considered the merits, so if it erred in procedure -- which it did not -- the appropriate remedy would be a remand to the Court of Appeals. Viewing the case broadly, no court of appeals has issued any decision regarding the specific procedure to be observed when *Roadway Express* claims are made.

The 1980 amendment[3] conforming 28 U.S.C. § 1927 to the principles of *Roadway Express* is also too new to have generated any significant decisional law regarding procedure.[4]

C. Granting Certiorari Would Only Waste Resources On Petitioner's Moot, Hollow And Meritless Contentions.

If any case is needed to discuss procedure under *Roadway Express, Inc. v. Piper*, this is not it. Granting certiorari to consider any issue would only involve this Court and others in further unmeritorious proceedings. Indeed, a review of Michael Kaye's arguments demonstrates not that he intends to raise procedural issues but that he believes *Roadway Express* was wrongly decided. Much of his analysis is based on a case overruled by *Roadway Express* and student commentaries critical of imposition of sanctions.

1. Michael Kaye's Appeal Was Moot.

On November 17, 1980 the Shens paid respondents $20,000.00; the Shens and respondents settled all disputes among each other. An Acknowledgement of Full Satisfaction of Judgment as against the Shens *and* Michael Kaye was filed. Both the Shens and respondents released Michael Kaye from all liability resulting from the reopening proceedings. Neither before nor after the settlement was Michael Kaye required to pay or do anything for which he could obtain recovery if the judgment were reversed.

Respondents moved to dismiss Michael Kaye's appeal as moot. The motion was denied, but it should have been granted. Among the many

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[3] Public Law 96-349, § 3; 94 Stat. 1156.

[4] Michael Kaye's citation to *Glass v. Pfeffer*, 657 F.2d 252, 257-58 (10th Cir. 1981) is intellectually disingenuous. In that case the district court had awarded sanctions under 28 U.S.C. § 1927 before *Roadway Express*, before the statute's amendment and without any notice or hearing whatsoever. The case has also been disapproved. *White v. New Hampshire Dept. of Employment Security*, 102 S.Ct. 1162 (1982).

reasons for denying certiorari is that the dismissal is as well supported by mootness as it is by the failure to post the bond. *See California Bankers Assn. v. Shultz*, 416 U.S. 21, 71 (1974).

When a judgment debtor is no longer liable on a judgment and could not obtain a recoupment after a reversal, the debtor's appeal from the judgment is moot and must be dismissed. *Little v. Bowers*, 134 U.S. 547 (1890); *Leader Clothing Co. v. Fidelity & Casualty Co. of New York*, 227 F.2d 574, 576 (10th Cir. 1955); *see Anderson v. Carder*, 150 P.2d 754 (Kan. 1944) and *Sager v. Moy*, 9 Atl. 847 (R.I. 1887). Michael Kaye has no continuing stake in the orders below. Respondents have judicially admitted that because of the release and satisfaction he has no potential liability for malicious prosecution or abuse of process. In almost two years he has not been subjected to discipline or investigation. At most he was subjected to some adverse publicity. This Court does not sit to reverse newspapers.

2. Michael Kaye Received Fair Notice Of The Request For A Fee Award.

From the day respondents filed their first memorandum opposing the motion to reopen, Michael Kaye knew that respondents were seeking counter-relief in the form of sanctions against him for bad faith conduct. 1 *Excerpt* 159-166. Respondents' memorandum was filed May 12, 1980, almost two months before the hearing date. 1 *Excerpt* 129. The memorandum discussed in great detail the basis of the demand for sanctions. Michael Kaye was certainly aware of the request. He replied to it in part by accusing respondents of "editorial distortion" in a memorandum filed May 15, 1980. 1 *Excerpt* 222, 228-229. He declared his good faith and belief in the Shens' cause under oath the same day. 1 *Excerpt* 233, 236-237. Although respondents expected to *quantify* their cost and fee award by the bill-of-costs procedure, it was quite clear that respondents intended to seek determination of their right to the award as part of the main motion. 1 *Excerpt* 133, 165-166. Respondents' request was repeated in a supplemental memorandum filed June 30, 1980,

discussing new evidence of bad faith and the newly-decided *Roadway Express* case. 6 *Excerpt* 1743-1770. Again it was clear that respondents sought immediate determination of their right to a cost and fee award. In the June 30 memorandum respondents pointed out that Michael Kaye had *then* received adequate notice of the basis and grounds for the request for fees. 6 *Excerpt* 1746. Respondents confined their arguments at the hearing to matters of record. No new evidence was offered, nor were new allegations made.

If Michael Kaye had any doubt of the issues respondents tendered to the District Court for decision, that doubt should have been resolved when respondents' counsel made his opening remarks requesting a fee award. *Reporter's Transcript of Proceedings*, July 7, 1980 at 23-24. Although respondents requested the Court to quantify the award by the bill-of-costs procedure, Judge Orrick suggested that counsel immediately file their summary declarations regarding costs and fees. *Id.* at 24. The District Court's actions plainly indicated that both the right to a fee award and the amount of fees were taken under submission.

If Michael Kaye believed he had not received fair notice he could have done any one of at least four things:

1. Object to the filing of the declarations and to any argument on the bad-faith issue;

2. Request further argument time;

3. Request that the Court bifurcate issues and hear argument on the bad-faith issue later, either before or after deciding the main motion; or

4. File supplemental papers addressing the bad-faith issue.

Indeed, Michael Kaye did file post-argument papers of broad scope, not limited to responding to respondents' post-argument papers. 6 *Excerpt* 1811-1843. In these papers Michael Kaye mentioned neither the

procedure nor the substance of respondents' request for an award of full costs and attorneys' fees.

Respondents based their entitlement to fees entirely on the record. Michael Kaye received no evidentiary surprises at the hearing; no new allegations were made against him; respondents' arguments repeated the written submissions.

Michael Kaye had numerous opportunities to apprise the District Court of his belief -- assuming he truly had one -- that procedural error was occurring. If petitioner had made his contentions in the District Court, any procedural error could have been cured promptly. By hiding his procedural candle from the District Court, Kaye doused it. He cannot raise any error on appeal. *Westinghouse Electric Corp. v. Weigel*, 426 F.2d 1356, 1357 (9th Cir. 1970); *see Rothman v. Hospital Service of Southern California*, 510 F.2d 956, 960 (9th Cir. 1975).

3. Michael Kaye Had No Right To A Trial-Type Hearing.

Roadway Express refutes Michael Kaye's claim to a trial-type hearing. This Court remanded the case for determination in the district court of whether the conduct of Piper, Brown and Stomile "constituted or was tantamount to bad faith. . . ." *Roadway Express, Inc. v. Piper, supra*, 447 U.S. at 767. The Court did not suggest that a trial was required. Since the issue of when and how sanctions may be granted was squarely presented to this Court, it is part of the holding of *Roadway Express* that a trial is not required. Indeed, this Court commented:

> The due process concerns posed by an outright dismissal are plainly greater than those presented by assessing counsel fees against lawyers. *Id.* at 767 n.14.

The District Court based its decision upon a 2,000-page record and a full hour of argument. It was clear to everyone that the legal standard to be applied to respondents' request was "bad faith" so briefing and argument of issues of law relating to that standard were unnecessary. If

Michael Kaye had convinced the District Court that his clients' case was of some merit, that showing and his subjective statement of his good faith and belief in his clients' cause would have avoided a fee award. The hearing itself focused upon key issues of Michael Kaye's bad faith: when he knew particular facts and how he explained his approval of the release.[5] Michael Kaye has suggested no further evidence or argument he would have put before the District Court.

A party has a right to a hearing before imposition of discovery sanctions. F.R. Civ. Proc. Rule 37. However, if the matter is submitted on memoranda and the record, and the sanctioned party does not request a hearing on the sanctions, the record and memoranda are a sufficient hearing. *Hayden Stone, Inc. v. Brode*, 508 F.2d 895, 897 (7th Cir. 1974); *Persson v. Faestel Investments, Inc.*, 88 F.R.D. 668, 669-670 (N.D. Ill. 1980). Even where the discovery sanction is dismissal of a lawsuit, an evidentiary hearing is unnecessary if the record is adequate and testimony would be cumulative. *Margoles v. Johns*, 587 F.2d 885, 888-889 (7th Cir. 1978). The most serious sanctions, including dismissal, can constitutionally be applied by a trial judge without the aid of a jury or a full-blown evidentiary hearing with cross-examination. *Societe Internationale Pour Participations Industrielles v. Rogers*, 357 U.S. 197, 209-210 (1958); *see National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976) *reh. denied sub nom. United States v. Janis*, 429 U.S. 874 (1976), reinstating a district court's dismissal of a complaint based on the plaintiff's bad faith in discovery. This Court in *Roadway Express* specifically contrasted the greater due process rights afforded a litigant facing dismissal in *Societe Internationale* with the lesser rights of the sanctioned attorney. *Roadway Express, Inc. v. Piper, supra*, 447 U.S. at 767 n.14. Respondents based their entitlement to fees entirely on the record. The District Court's procedure, to which Michael Kaye did not

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[5] Unless Michael Kaye intended to defend his own good faith by showing that he was deceived by his clients, there were no inconsistencies between his position and the Shens'. By showing some merit in the Shens' claims, Kaye would have shown that he was not proceeding in bad faith.

object, was not error. Kaye's string-citations regarding the right to trial-type hearings in contempt cases are not in point.

If error occurred, Michael Kaye virtually invited it. Any procedural error could have been cured in the District Court if it had been raised, and this Court should not now consider petitioner's contentions. *Westinghouse Electric Corp. v. Weigel, supra*, 426 F.2d at 1357; *see Rothman v. Hospital Service of Southern California, supra*, 510 F.2d at 960.

4. Michael Kaye Had No Right To Jury Trial.

Just as *Roadway Express* refutes Michael Kaye's claim to a trial-type hearing, it refutes his assertion of jury rights. If this Court intended to require jury trials in fee award matters, it would have said so. Footnote 14 of *Roadway Express* makes the claim to a right to trial by jury absurd. Indeed, Michael Kaye's arguments in support of a right to jury trial show that he actually wants this Court to reverse *Roadway Express*. Such a position puts him at odds with all three co-ordinate branches of government now that the principle of *Roadway Express* has been incorporated in 28 U.S.C. § 1927.

Michael Kaye's claim of jury rights rests upon two inapt analogies while he ignores a much closer parallel. Bad faith sanctions much more closely resemble awards of fees and costs in discovery matters than they resemble criminal contempt or independent lawsuits. Awards of fees and costs are routinely made against attorneys for improper conduct in discovery. *Barker v. Bledsoe*, 85 F.R.D. 545, 549 (W.D. Okla. 1979); *Szilvassy v. United States*, 71 F.R.D. 589, 594 (S.D.N.Y. 1976); *Shapiro v. Freeman*, 38 F.R.D. 308, 312-313 (S.D.N.Y. 1965); *Braziller v. Lind*, 32 F.R.D. 367, 368 (S.D.N.Y. 1963). These sanctions are awarded by the judge hearing the discovery matter, and at least the right to sanctions is determined in conjunction with the main motion. *See, e.g., Persson v. Faestel Investments, Inc., supra*. This Court allows the most serious discovery sanctions to be imposed without trial-type hearing. (*See supra*, page 22). Obviously a jury is not required.

This Court expressly contrasted the contempt power with the inherent power to assess attorneys' fees against counsel in "narrowly defined circumstances. . . ." *Roadway Express, Inc. v. Piper, supra*, 447 U.S. at 764-765. Thus, this Court already rejected the criminal contempt analogy as a basis for a right to jury trial. As Kaye admits, there is no right to jury trial in the case of civil contempt.[6] This Court has recognized the propriety of non-purgeable compensatory civil contempt awards. *United States v. United Mine Workers*, 330 U.S. 258, 303-04 (1947).

Petitioner's malicious prosecution analogy is specious. The authority for the argument is principally an overruled case and a misquoted out-of-date student comment. The case, *Smoot v. Fox*, 353 F.2d 830, 833 (6th Cir. 1965) *cert. denied sub nom. League of Women Voters v. Smoot*, 384 U.S. 909, *reh. denied* 384 U.S. 958 (1966), holds as a matter of general federal law that bad faith does not create an exception to the American Rule against recovery of attorneys' fees. Thus both in holding and rationale the case was overruled by *Roadway Express*. Michael Kaye's reference to the student note (Petition 12) omits the "If" at the beginning of a sentence and thus makes declarative that which the student intended to be conditional. Comment, *Nemeroff v. Abelson, Bad Faith, And Awards of Attorneys' Fees*, 128 U. Pa. L. Rev. 468, 482 (1979). The malicious prosecution argument is nothing but an intellectually dishonest use of authority. Petitioner succeeds at best in showing that some of the elements of the tort of malicious prosecution and some of the policies for recognizing the tort are similar to the elements of bad faith and the policies for granting fee awards. The policies supporting traffic laws and some of the elements of traffic offenses are similar to the policies for and elements of the tort of negligence, but that does not confer a right to jury trial in a traffic case. *Duncan v. Louisiana*, 391 U.S. 145, 159-162 (1968), *reh. denied* 392 U.S. 947 (1968). Among other things, the elements of damage for malicious prosecution -- including punitive damages -- are substantially different from the elements of bad faith. The degree of

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[6] Even a criminal contempt is a petty crime for which the states need not afford jury trial. *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 219-220 (1968).

scienter -- negligence, recklessness or intent -- may vary from jurisdiction to jurisdiction. The policy of vindicating the integrity of the courts is not a basis for recognizing the malicious prosecution tort. Malicious prosecution relates not at all to bad faith activities which occur during the prosecution or defense of a position in litigation which may be meritorious. *See, e.g.*, the bizarre manipulations of procedure in what might be a meritorious case in *Pfister v. Delta Air Lines*, 496 F.Supp. 932 (N.D. Ga. 1980); and *Textor v. Board of Regents of Northern Illinois University*, 87 F.R.D. 751, 754 (N.D. Ill. 1980) (jurisdictional defects in potentially meritorious case).

The real thrust of Michael Kaye's argument is that *Roadway Express* was wrongly decided. The malicious prosecution analogy was used by the *Smoot* court and some commentators to argue against the inherent power to impose sanctions. Now that Congress has specifically authorized sanctions under 28 U.S.C. § 1927, reconsideration of *Roadway Express* is hardly pertinent.

CONCLUSION

The Petition for Certiorari fails to set forth a single argument worthy of this Court's attention under the standards of Supreme Court Rule 17. It should be denied.

Respectfully submitted,

/s/
CHARLES A. BIRD
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No. 81-2212

IN THE

Supreme Court of the United States

October Term, 1981

MICHAEL KAYE,

Petitioner,

v.

LUCE, FORWARD, HAMILTON & SCRIPPS; and THEODORE W. GRAHAM,

Respondents.

SUPPLEMENTAL MEMORANDUM AND REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

	Page
SUPPLEMENTAL MEMORANDUM	1
REPLY BRIEF	
I. PUBLICATION OF THE DISTRICT COURT OPINION CALLING FOR PETITIONER'S DISBARMENT HAS PRODUCED SEVERE AND ENDURING COLLATERAL CONSEQUENCES WHICH ARE INCONSISTENT WITH MOOTNESS	1
II. THE FAIR NOTICE REQUIRED BY *ROADWAY EXPRESS* FOR IMPOSITION OF FEE SANCTIONS AGAINST COUNSEL SHOULD BE AT LEAST AS TIMELY AND INFORMATIVE AS THE NOTICE PRESCRIBED BY THE FEDERAL RULES OF CIVIL PROCEDURE TO APPRISE AFFECTED PARTIES OF A PENDING MOTION FOR SUMMARY JUDGMENT	4
CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 8

Babb v. Superior Court, 3 Cal.3d 841, 479 P.2d 379, 92 Cal.Rptr. 179 (1971) 9

Bishop v. Wood, 426 U.S. 341 (1976) 4

Canning v. Star Publishing Co., 19 F.R.D. 281 (D.Del. 1956) 7

Capital Films Corp. v. Charles Fries Productions, Inc., 628 F.2d 387 (5th Cir. 1980) 7

Church of Scientology of Hawaii v. United States, 485 F.2d 313 (9th Cir. 1973) 1

Connell v. Shoemaker, 555 F.2d 483 (5th Cir. 1977) 1

Consortium of Community Based Organizations v. Donovan, 530 F.Supp. 520 (E.D.Cal. 1982) 7

Crown Central Petroleum Corp. v. Waldman, 634 F.2d 127 (3d Cir. 1980) 7

Denton v. Mr. Swiss of Missouri, Inc., 564 F.2d 236 (8th Cir. 1977) 7

In re Marriage of Flaherty, 31 Cal.3d 637, 646 P.2d 179, 183 Cal.Rptr. 508 (1982) 1,3,4,5

Georgia Southern & Florida Ry. Co. v. Atlantic Coast Line R.R. Co., 373 F.2d 493 (5th Cir.), *cert. denied*, 389 U.S. 851 (1967) 7,8

Matter of Hailey, 621 F.2d 169 (5th Cir. 1980) 6

TABLE OF AUTHORITIES (Continued)

Page

CASES (Continued)

Hanson v. Polk County Land, Inc., 608 F.2d 129 (5th Cir. 1979) 6

Jones v. Menard, 559 F.2d 1282 (5th Cir. 1977) 7

Justin v. Jacobs, 449 F.2d 1017 (D.C.Cir. 1971) 1

Kibort v. Hampton, 538 F.2d 90 (5th Cir. 1976) 7

Macklin v. Butler, 553 F.2d 525 (7th Cir. 1977) 8

Estate of Merrill, 29 Cal.2d 520, 175 P.2d 819 (1946) ... 3

Metcalf v. Drew, 75 Cal.App.2d 711, 171 P.2d 488 (1946) 3

Monk v. Roadway Express, Inc., 73 F.R.D. 411 (W.D. La. 1977), *vacated*, 599 F.2d 1378 (5th Cir. 1979), *modified sub nom. Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980) 8

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 4

In re National Student Marketing Litigation, 445 F.Supp. 157 (D.D.C. 1978), 78 F.R.D. 726 (D.D.C. 1978), *aff'd sub nom. Lipsig v. National Student Marketing Corp.*, 663 F.2d 178 (D.C. Cir. 1980) 9

Nemeroff v. Abelson, 469 F.Supp. 630 (S.D.N.Y. 1979), *rev'd in part*, 620 F.2d 339 (2d Cir. 1980) 8

Paul v. Davis, 424 U.S. 693 (1976) 4

Penthouse International, Ltd. v. Playboy Enterprises, 663 F.2d 371 (2d Cir. 1981) 3,9

TABLE OF AUTHORITIES (Continued)

Page

CASES (Continued)

Pfister v. Delta Air Lines, Inc., 496 F.Supp. 932 (N.D. Ga. 1980) 9

Richards v. Gordon, 254 Cal.App.2d 735, 62 Cal.Rptr. 466 (1967) 3

Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980) ... 4,8,10

Robinson v. Ritchie, 646 F.2d 147 (4th Cir. 1981), *on remand*, 516 F.Supp. 437 (E.D. Va. 1981) 8,9

Sequoia Union High School District v. United States, 245 F.2d 227 (9th Cir. 1957) 6

Sharlitt v. Gorinstein, 535 F.2d 282 (5th Cir. 1976) 7

Matter of Shen, 7 Bankr. 942 (S.D. Cal. 1980) 1-2

Sibron v. State of New York, 392 U.S. 40 (1968) 1

Skinner v. White, 505 F.2d 685 (5th Cir. 1974) 2

Stone v. Olson, 588 F.2d 1316 (10th Cir. 1978) 7

United States v. Schrimsher, 493 F.2d 842 (5th Cir. 1974) 2

RULES

Federal Rules of Civil Procedure
Rule 6 6
Rule 56 5,6

TABLE OF AUTHORITIES (Continued)

Page

RULES (Continued)

Local Rules, U.S. District Court for the Southern District of California
Rule 220-6 6
Rule 265-1 6

SECONDARY AUTHORITIES

Stern, Robert L., and Eugene Gressman, *Supreme Court Practice* (5th ed. 1978)..... 3

SUPPLEMENTAL MEMORANDUM

On June 17, 1982, the California Supreme Court announced procedural standards for the imposition of fee sanctions against counsel who prosecute frivolous litigation. *See In re Marriage of Flaherty*, 31 Cal.3d 637, 645-654, 646 P.2d 179, 184-190, 183 Cal.Rptr. 508, 513-519 (1982).

The *Flaherty* case is pertinent to this petition for two reasons: (1) it reflects the broad contemporary importance of the fee sanction issues submitted here, and (2) it supplies the preliminary constitutional analysis which is otherwise missing from the record below due to the pretermission of procedural issues by the Ninth Circuit.

The issues in this case are timely, important, and ripe for review.

REPLY BRIEF

I

PUBLICATION OF THE DISTRICT COURT OPINION CALLING FOR PETITIONER'S DISBARMENT HAS PRODUCED SEVERE AND ENDURING COLLATERAL CONSEQUENCES WHICH ARE INCONSISTENT WITH MOOTNESS

A case cannot become moot so long as it continues to produce collateral consequences which have an adverse effect on any of the parties. The collateral consequences doctrine found its first expression in this Court in a criminal case. *Sibron v. State of New York*, 392 U.S. 40, 53-58 (1968). But the doctrine applies widely to civil litigation as well. *See, e.g., Connell v. Shoemaker*, 555 F.2d 483, 486-487 (5th Cir. 1977); *Church of Scientology of Hawaii v. United States*, 485 F.2d 313, 317-318 (9th Cir. 1973); *Justin v. Jacobs*, 449 F.2d 1017, 1019 (D.C. Cir. 1971).

The district judge in this case accused petitioner of unethical conduct "bordering on attempted fraud upon the Court." *Matter of Shen*, 7

Bankr. 942, 946 (S.D.Cal. 1980). He explicitly questioned petitioner's right and qualifications to practice law and officially recommended the initiation of disbarment proceedings. *Id.*, 7 Bankr. at 944, text accompanying footnote 2.

An accusation of "fraud on the Court" is a criminal contempt charge. *Skinner v. White*, 505 F.2d 685, 689 (5th Cir. 1974). Attempted fraud on the court would also be contumacious. And conduct "bordering on attempted fraud" is at least inferentially contemptuous if it deserves a punitive sanction of the magnitude imposed below — $36,339.29.

Criminal contempt convictions do not become moot just because the accused has completed his sentence of confinement or some third party has paid off a portion of the fine. A conviction for criminal contempt carries severe career consequences for an attorney. Those collateral consequences include the risk of disciplinary action by a bar association, foreclosure of opportunities for appointment to the bench or other high office, damage to professional reputation, and impairment to the attorney's ability to attract clients and to represent them effectively in open court. *United States v. Schrimsher*, 493 F.2d 842, 844 (5th Cir. 1974).

Even if this case were regarded as a strictly civil matter, the same collateral consequences principles would govern. The District Court certified its opinion for publication in the national reporter system and promptly alerted the local press. Petitioner first learned about the decision from widely circulated newspaper accounts, not from the Court.

The result for petitioner was immediate professional disgrace and economic ruin. Petitioner's law practice has been virtually destroyed, and the door has slammed shut on other employment opportunities except at a sub-professional level.

A published attack on an attorney's integrity and motives is a severe sanction which can have a devastating impact on his or her ability to

obtain employment and to function effectively within the judicial system. *In re Marriage of Flaherty*, 31 Cal.3d 637, 652, 646 P.2d 179, 189, 183 Cal.Rptr. 508, 518 (1982).

An official reprimand may disqualify an attorney for admission to practice in other courts. *See* R. Stern and E. Gressman, *Supreme Court Practice* § 19.3 at 913 (5th ed. 1978). And it is likely to provoke disciplinary action in courts where the accused attorney is already a member of the bar.

An attorney who suffers stigmatizing professional condemnation in a published opinion acquires independent standing to prosecute his own appeal whether or not he was made a party to the judgment. *See, e.g., Penthouse International, Ltd. v. Playboy Enterprises*, 663 F.2d 371, 373, 392 (2d Cir. 1981) (allowing intervention on appeal).

Whenever a judgment embraces findings of attorney misconduct, the attorney is entitled to appellate review on the merits. The case does not become moot even if a co-party pays the judgment in full. Otherwise the judgment would attain finality and expose the attorney to adverse collateral consequences without an opportunity to test the validity of the underlying adjudication. *Estate of Merrill*, 29 Cal.2d 520, 523-525, 175 P.2d 819, 821-822 (1946).

The District Court's disbarment recommendation is still pending. Petitioner's former clients could also bring an action for legal malpractice if they so choose. In either event, if the District Court findings attain finality, those findings could operate with collateral estoppel effect to prevent relitigation of any matter decided below. *See Richards v. Gordon*, 254 Cal.App.2d 735, 738-739, 62 Cal.Rptr. 466, 468-469 (1967) (doctrine of issue preclusion applies to disciplinary proceedings); *Metcalf v. Drew*, 75 Cal.App.2d 711, 719-722, 171 P.2d 488, 493-495 (1946) (finality of civil fraud judgment would preclude defense on the merits against disciplinary action to revoke a professional broker's license).

The interests at stake here are not *de minimis*. This case is distinguishable from *Bishop v. Wood*, 426 U.S. 341, 348-349 (1976), because the official defamation here has been widely published. The case is also distinguishable from *Paul v. Davis*, 424 U.S. 693, 705-706 (1976), in that the official charges have virtually destroyed petitioner's livelihood.

Petitioner has a protected liberty and property interest in the outcome. Fundamental fairness requires that an attorney be permitted to defend himself publicly against official charges which threaten to stain his personal and professional future. *In re Marriage of Flaherty, supra*, 31 Cal.3d at 652-653, 646 P.2d at 189, 183 Cal.Rptr. at 518 (1982).

A Ninth Circuit motion panel deliberated over extensive briefs and concluded that Luce Forward's mootness contentions were without merit. [*See* Petition at Appendix 2]. There has been no change of facts since that date to warrant a different result.

II

THE FAIR NOTICE REQUIRED BY *ROADWAY EXPRESS* FOR IMPOSITION OF FEE SANCTIONS AGAINST COUNSEL SHOULD BE AT LEAST AS TIMELY AND INFORMATIVE AS THE NOTICE PRESCRIBED BY THE FEDERAL RULES OF CIVIL PROCEDURE TO APPRISE AFFECTED PARTIES OF A PENDING MOTION FOR SUMMARY JUDGMENT

"Due process is a flexible concept, and must be tailored to the requirements of each particular situation." *In re Marriage of Flaherty*, 31 Cal.3d 637, 654, 646 P.2d 179, 190, 183 Cal.Rptr. 508, 519 (1982). At a minimum, however, due process requires that any significant deprivation of liberty or property by adjudication "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

The District Court announced its official recommendation for disbarment proceedings against petitioner in a scathing opinion which it certified for publication. That published criticism was itself a "severe sanction." *In re Marriage of Flaherty, supra*, 31 Cal.3d at 652, 646 P.2d at 189, 183 Cal.Rptr. at 518. A high order of procedure was therefore appropriate to the nature of the case.

The Court also imposed a cost and fee sanction against petitioner in the amount of $36,339.29. That fee penalty was equivalent to a summary judgment for the tort of malicious prosecution or abuse of process. At a minimum, the sanction procedure should have conformed to the notice standards for summary judgment under Rule 56, F.R.Civ.P.

But petitioner received neither notice nor opportunity to be heard on the sanction issue. There was no trial. There was no sanction hearing. There was no notice. Luce Forward moved orally for sanctions at a hearing calendared and noticed for a different purpose. It delayed its motion and held back its supporting affidavits until after petitioner had used up his full allowance of time and had no opportunity to respond.

Luce Forward insists that its intentions were "quite clear" and that the abbreviated sanction procedure in this case satisfies all the requisites of due process. [Opposition Brief at 19 et seq.]

But Luce Forward never filed or served a written motion or cross-motion for sanctions. It never applied for an order to show cause on the sanction issue. It never gave advance notice in writing or otherwise that it intended to piggy-back a sanction motion onto the July 7, 1980 hearing of the Shens' motion to reopen their case.

On the contrary, Luce Forward's attorneys carefully concealed their "quite clear" intentions by falsely representing that they would request a fee award "according to the bill-of-costs procedure." [*See* 1 *Excerpt of Record* 129, 165:21-22.]

No one is entitled to apply for costs under the bill of costs procedure before attaining the status of prevailing party. Rule 265-1 of the Local Rules of the U.S. District Court for the Southern District of California permits application for costs only "after the making of an order for judgment or decree." Even then, a prevailing party must serve and file a verified and itemized cost bill and must give advance written notice of the date and hour when the application will be made. Luce Forward complied with none of those requirements.

Even the most routine motions must be submitted in writing with service of notice at least five days before the date and hour specified for the hearing. Rule 6(d), F.R.Civ.P. Summary judgment motions require advance notice of at least ten days. Rule 56(c), F.R.Civ.P. And the advance notice requirement increases to 17 days under Local Rule 220-6 of the U.S. District Court for the Southern District of California. Luce Forward casually disregarded all of those notice standards.

Luce Forward's "quite clear" intentions were certainly not clear to the District Court. The court issued its own notice of hearing after it recalendared the Shen motion. That official notice made no mention of any pending cross-motion for fee sanctions. [*See* 6 *Excerpt of Record* 1742.] At the outset of the July 7, 1980 hearing, both the clerk of court and the district judge announced that the purpose of the proceeding was to hear the Shen motion to reopen. They did not even hint that any request for fee sanctions was on the docket. [R.T. 3:1-14 (July 7, 1980).]

Petitioner had no reason to anticipate that fee sanction issues would come up at the July 7, 1980 hearing. The Ninth Circuit does not permit oral motions for summary judgment. *Sequoia Union High School District v. United States*, 245 F.2d 227, 228 (9th Cir. 1957). *Accord, Matter of Hailey*, 621 F.2d 169, 171-172 (5th Cir. 1980); *Hanson v. Polk County Land, Inc.*, 608 F.2d 129, 131 (5th Cir. 1979). No court should permit unnoticed oral motions for fee sanctions in excess of $36,000 where genuine issues of material fact are in dispute.

Luce Forward's oral motion for sanctions failed to give the fair notice required by due process. On the other hand, if the sanction motion actually originated somewhere in Luce Forward's massive opposition papers, it was defective for three reasons.

In the first place, written opposition to a motion does not in itself constitute a cross-motion for affirmative relief. *Denton v. Mr. Swiss of Missouri, Inc.*, 564 F.2d 236, 241 at text accompanying footnote 8 (8th Cir. 1977).

In the second place, even if Luce Forward's opposition papers could be construed as some kind of countermotion, that purported countermotion would be ineffective for any purpose until Luce Forward served and filed a notice of motion in strict compliance with the rules of procedure. *See Consortium of Community Based Organizations v. Donovan*, 530 F.Supp. 520, 541 (E.D.Cal. 1982). A notice of motion must specify a definite date on which the motion will be heard and taken under advisement. *Capital Films Corp. v. Charles Fries Productions, Inc.*, 628 F.2d 387, 392 (5th Cir. 1980); *Kibort v. Hampton*, 538 F.2d 90, 91 (5th Cir. 1976). Luce Forward never served or filed any such notice of motion.

The fact that one party has already given notice of hearing on a motion of its own does not excuse the adverse party from serving a timely cross-notice if it intends to pursue different relief on a different claim at the same hearing. *See, e.g., Crown Central Petroleum Corp. v. Waldman*, 634 F.2d 127, 128-129 (3d Cir. 1980); *Sharlitt v. Gorinstein*, 535 F.2d 282, 283-284 (5th Cir. 1976); *Georgia Southern & Florida Ry. Co. v. Atlantic Coast Line R.R. Co.*, 373 F.2d 493, 495-498 (5th Cir.), *cert. denied*, 389 U.S. 851 (1967).

In the third place, affidavits in support of a motion must be served with the motion. *Stone v. Olson*, 588 F.2d 1316, 1321 (10th Cir. 1978); *Jones v. Menard*, 559 F.2d 1282, 1285 at final paragraph of footnote 5 (5th Cir. 1977); *Canning v. Star Publishing Co.*, 19 F.R.D. 281, 283-284 (D.Del. 1956). Luce Forward carefully held back its fee affidavits to

spring as a surprise without notice at the July 7, 1980 hearing. [R.T. 23:15 - 25:4 (July 7, 1980).]

If the sanction motion originated at the hearing, it was defective for lack of fair notice. If the motion originated prior to the hearing, then its major supporting affidavits were untimely served and filed. In either event, Luce Forward relied on sharp practices to catch petitioner by surprise and to prevent effective response.

The federal rules do not authorize "disposition by surprise." *Macklin v. Butler*, 553 F.2d 525, 530 (7th Cir. 1977). Summary dispositions should not be accomplished "by an unforeseeable thrust with no chance to parry." *Georgia Southern & Florida Ry. Co. v. Atlantic Coast Line R.R. Co., supra*, 373 F.2d at 498.

Luce Forward could have made its intentions "quite clear" by the conventional expedient of complying with prescribed procedure. It could have served and filed an explicit motion for sanctions, attached its fee affidavits, reserved a hearing date, and given formal notice of the motion hearing. Instead, it deceived and lulled petitioner by falsely announcing that it would proceed through a bill-of-costs procedure after judgment.

Besides lack of fair notice, there is a further reason why petitioner could not reasonably have foreseen that sanction issues would come up before entry of judgment on the merits. Anglo-American courts have traditionally postponed the assessment of attorney fees and costs until litigation of the substantive claims has terminated. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 fn. 18 (1975).

The leading fee sanction cases have generally followed that tradition. *See, e.g., Monk v. Roadway Express, Inc.*, 73 F.R.D. 411, 412-413 (W.D. La. 1977), *vacated on other grounds*, 599 F.2d 1378, 1380-1381 (5th Cir. 1979), *modified in part sub nom. Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); *Robinson v. Ritchie*, 646 F.2d 147, 148 at text accompanying footnote 2 (4th Cir. 1981); *Nemeroff v. Abelson*, 469 F.Supp. 630, 632 (S.D.N.Y. 1979), *rev'd in part on other grounds*, 620

F.2d 339 (2d Cir. 1980); and *In re National Student Marketing Litigation*, 445 F.Supp. 157 (D.D.C. Jan. 9, 1978) (dismissing counterclaim), 78 F.R.D. 726, 727-728 (D.D.C. July 26, 1978) (imposing sanctions), *aff'd sub nom. Lipsig v. National Student Marketing Corp.*, 663 F.2d 178 (D.C. Cir. 1980).

Sanctions are occasionally imposed while a case is still in progress. But it takes a formal written motion to activate the sanction procedure. The court must conduct an evidentiary hearing. And the sanction hearing is almost invariably severed from any adjudication of the merits of the case in chief. *See, e.g., Pfister v. Delta Air Lines, Inc.*, 496 F.Supp. 932 (N.D. Ga. 1980).

It is essential to bifurcate and postpone sanction proceedings pending disposition of the merits in order to avoid driving an automatic wedge between attorney and client. Otherwise, any party could always force the immediate disqualification of its opposing counsel by alleging bad faith and demanding sanctions from attorney and client alike on a theory of joint and several liability. *See, e.g., Penthouse International, Ltd. v. Playboy Enterprises*, 663 F.2d 371, 373, 392 (2d Cir. 1981) (recognizing conflict of interest between attorney and client and remanding to determine who should pay the sanction assessment); *Robinson v. Ritchie, supra*, 646 F.2d at 148-149, *on remand*, 516 F.Supp. 437, 439-440 (E.D. Va. 1981) (sanction procedure drives a wedge between attorney and client, requiring the attorney's disqualification); and *Babb v. Superior Court*, 3 Cal.3d 841, 847-848, 479 P.2d 379, 382, 92 Cal.Rptr. 179, 182 (1971) (counterclaim for malicious prosecution, if allowed, would place attorney in a potentially adverse relation to his client).

Luce Forward trapped petitioner in a procedural ambush by concealing its "quite clear" intentions from everyone but itself. Lack of notice caught petitioner unprepared. His allotment of time had already been used up before Luce Forward even broached the sanction issue. And ethical imperatives dictated silence because petitioner's self-interest

in avoiding personal sanctions was in potential conflict with his duty to protect the Shens against fee liability.

Luce Forward procured the sanction award by sharp practices without fair notice or hearing.

CONCLUSION

Luce Forward has devoted much effort to depicting petitioner as an unmitigated rogue who does not deserve fair procedure. The misrepresentations, distortions, and half-truths which it has resorted to in service of that end are too numerous and complex to meet effectively in the restricted space of this reply.

Most of the personal disparagements aimed at petitioner have little or no bearing on the issues actually submitted and were interjected here, as in the courts below, only for their prejudicial and distractive impact.

Scoundrels no less than saints are entitled to due process, and alleged scoundrels have perhaps the greater need. The material fact disputes in this case should have been resolved by trial, not by abbreviated procedure.

Roadway Express was a milestone in this Court's treatment of bad faith litigation. But it was not the last word. The establishment of adequate procedural safeguards is essential to make sure that legitimate advocacy is neither chilled nor punished in the effort to deter real abuses. The issues submitted in this case are of sufficient general importance to warrant review. The petition should be granted.

Respectfully submitted,

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